86-1222

Supreme Court, U.S.
FILED
JAN 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1986

DALE E. KRAUS, ET UX., ET AL.,

Respondents/Appellees,

v.

COUNTY OF PIERCE, ET AL.,

Petitioners/Appellants,

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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41PP

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QUESTIONS PRESENTED

1. Where state courts interpreting and applying federal law have sanctioned certain police conduct, can police violate "clearly established" federal rights and lose their qualified immunity against civil suits when they act pursuant to those state decisions?

2. Has the absence of probable cause to arrest occupants of a vehicle been "clearly established" where an armed robber escapes into a parking lot adjacent to the crime scene and just moments later the suspect car is seen running two stop signs while speeding away from that lot?

3. Where police at gunpoint require suspects in a recent armed robbery to momentarily kneel and raise their hands, and where under similar facts a

more intrusive seizure a year earlier was held by the Ninth Circuit in United States v. Taylor not to constitute an "arrest," have "clearly established rights" been violated?

4. Once a Court of Appeals under Mitchell v. Forsyth has taken jurisdiction over an appeal from a denial on summary judgment of a policeman's qualified immunity, does it have pendant appellate jurisdiction over the governmental defendant where there is an overlap between the appealable and otherwise nonappealable issues?

LIST OF ALL PARTIES TO THE PROCEEDING

Petitioners: County of Pierce, Lloyd Bird and "Jane Doe" Bird, Richard Rice and "Jane Doe" Rice, Richard Shadduck and "Jane Doe" Shadduck, Kenneth Tucker and "Jane Doe" Tucker, James Andrews and "Jane Doe" Andrews, and certain unknown members of the Pierce County Sheriff's Office.

Respondents: Dale E. Kraus and Rosetta M. Kraus, Cindy D. Kraus; and Todd Montgomery.

TABLE OF CONTENTS

I. OPINIONS BELOW..... 1

II. JURISDICTION..... 1

III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED..... 2

IV. STATEMENT OF THE CASE..... 2

V. REASONS FOR GRANTING PETITION... 7

A. The Court Should Settle The Split Among The Circuits On Whether State Police Lose Their Qualified Immunity By Relying On State Court Decisions Interpreting Federal Law..... 7

B. In Holding That The Deputies Did Not Have Probable Cause, The Court Of Appeals Is In Conflict With Decisions Of Other Federal Courts Which Have Found Probable Cause In Similar Circumstances... 14

C. In Holding That The Plaintiffs Were Arrested, The Court of Appeals Disregarded The Distinction Between Types Of Seizures And Ignored Its Own Precedent..... 19

D. Once An Appellate Court Has Taken Jurisdiction Over An Appeal From A Denial Of Summary Judgment On The Issue Of Qualified Immunity, It Also Has Pendent Appellate Jurisdiction Over The Governmental Employer Regarding The Overlapping Issues Of The Presence Of An Arrest And Probable Cause..... 27

VI. CONCLUSION..... 30

TABLE OF AUTHORITIES

Cases

Beck v. Ohio, 379 U.S. 89, 91, 13 L.Ed.2d 142, 85 S. Ct. 223 (1964)..... 14

Delesteine v. Beto, 418 F.2d 871, 872 (5th Cir. 1969)..... 16

Florida v. Royer, 460 U.S. 491, 500, 75 L.Ed.2d 229, 103 S. Ct. 1319 (1983)..... 21

Gerstein v. Pugh, 420 U.S. 103, 111, 43 L.Ed.2d 54, 95 S.Ct. 854 (1975)..... 14

Hamilton v. North Carolina, 260 F.Supp. 632 (E.D. N.C. 1966)..... 18

Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1983)..... 7,8,12

Hopson v. Wilson, 737 F.2d 1, 25-26 (D.C. Cir. 1984)..... 8

Kraus v. Pierce County, 793 F.2d 1105, 1108 (9th Cir. 1986)..... 1,7,15, 20, 28

Oregon v. Hass, 420 U.S. 714, 719, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975)..... 13

Owsley v. Payton, 352 F.2d 804, 805 (4th Cir. 1965)..... 12

Procunier v. Navarette, 434 U.S. 555, 565, 55 L.Ed.2d 24, 98 S.Ct. 855 (1978)..... 8

San Filippo v. U.S. Trust Co. of New York, 737 F.2d 246, 255 (2nd Cir. 1984)..... 29

Scearce v. Field, 292 F.Supp. 807 (C.D. Cal. 1968)..... 18

State v. Donohoe, 39 Wn.App. 778, 695 P.2d 150 (1985)..... 10

State v. Gluck, 83 Wn.2d 424, 518 P.2d 703 (1974)..... 10

State v. Hewey, 144 Vt. 636, 471 At.2d 236, 238-39 (1983). 22

State v. Jackson, 296 Ore. 430, 677 P.2d 221-226 (1984). 22

State v. Wakeley, 29 Wn.App. 238, 628 P.2d 835 (1981)..... 11,26

State v. Young, 39 Wn.2d 910, 239 P.2d 858 (1952)..... 10

Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968)..... 19,23

United States v. Evans, 447 F.2d 129, 130-32 (8th Cir. 1971)..... 17

United States v. Hensley, 469 U.S. ___, 83 L.Ed.2d 604, 612, 105 S.Ct. 675 (1985)..... 19,23

United States v. Mitchell, 457 F.2d 513, 514 (6th Cir. 1972)..... 17

United States v. Montoya De Hernandez, 473 U.S. ___, 87 L.Ed.2d 381, 392, 105 S.Ct. 3304 (1985)..... 21,25

United States v. Sharpe, 470 U.S. ___, 84 L.Ed.2d 605, 105 S.Ct. 1568 (1985)... 21,25

United States v. Taylor, 716 F.2d 701 (9th Cir. 1983). 25,26, 27

United States v. Thompson, 558 F.2d 522, 524 (9th Cir. 1977) cert. denied, 435 U.S. 914 (1978)..... 23

United States v. Troutman, 458 F.2d 217, 220 (10th Cir. 1972)..... 17

United States v. Woods, 432 F.2d 1072, 1075-76 (7th Cir. 1970)..... 12

Wallace v. King, 626 F.2d 1157, 1161 (4th Cir. 1980)..... 9

Ward v. County of San Diego, 791 F.2d 1329, 1332 (9th Cir. 1986)..... 9

Zweibon v. Mitchell, 720 F.2d 162, 168-69 (D.C. Cir. 1983). 8

Constitutional Provisions

U.S. Const. Amend. IV..... 2

Other Authorities

28 U.S.C. § 1254(1)..... 2

28 U.S.C. §§ 1331, 1343(a)(1), (2), (3) and (4).. 6

42 U.S.C. § 1981, 1983..... 6

42 U.S.C. § 1983..... 2

Treatise

3 W. LaFave, Search and Seizure, § 9.2 at 29-30 (1978)..... 20

I. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in Kraus v. Pierce County is reported at 793 F.2d 1105. See App. "A," p. 1.

II. JURISDICTION

The Honorable Jack Tanner, Judge for the United States District Court for the Western District of Washington, issued on September 20, 1985 an order denying summary judgment on the issues of, inter alia, qualified immunity, the existence of an arrest and of probable cause. See App. "A," p. 20. The opinion of the United States Court of Appeals for the Ninth Circuit affirming the lower court's ruling on the issues of arrest, probable cause and immunity, was entered on July 8, 1986 and amended on September 17,

1986. Rehearing was denied on October 29, 1986.

Jurisdiction is conferred on the United States Supreme Court to review this case by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. U.S. Constitutional Amendment IV: (See Appendix "D" for text.)

B. 42 U.S.C. § 1983: (See Appendix "D" for text.)

IV. STATEMENT OF THE CASE

On September 29, 1984 at approximately 7:50 p.m. James Brennan was robbed by an armed black man at the First Interstate Bank machine in the Villa Plaza shopping mall just outside the city limits of Tacoma, Washington. App. "C," pp. 1, 6-11. Robert Kay, who was waiting in his automobile to use the cash

machine, observed the incident and saw the robber run into the adjacent parking lot. Brennan told Kay that he had been robbed and, while Brennan called police, Kay attempted to pursue the robber into the parking lot. Though he lost sight of the assailant, Kay then saw a red hatchback with vanity license plate "KRAUS 2" rapidly leave the lot, run two stop signs and accelerate quickly once on the street. App. "C," p. 4. Kay observed two occupants in the car, but was unable to determine their races. App. "C," p. 13.

Kay then drove to the nearby Lakewood precinct of the Pierce County Sheriff's Office, and at approximately 7:52 p.m. reported all of the above to the deputy on duty. App. "C," pp. 4, 24-26. The sheriff's office traced the

license to the Kraus' Tacoma residence and immediately dispatched deputies to the address. There they found the suspect vehicle, its hood still warm, parked in front of the Kraus home. App. "C," p. 50. The County dispatcher then made a telephone call to Dale Kraus, asking him to step out the front door and speak with deputies investigating an armed robbery. App. "C," p. 19-22. Though Mr. Kraus professed to believe the call was a practical joke and told the dispatcher he could see no one in his yard, he stepped out the back door still holding his cordless telephone while another occupant of the house, Todd Montgomery, left through the front door. App. "C," pp. 21, 31-32, 37.

Once outside, both men walked rapidly toward the deputies who feared the

object carried by Kraus was a weapon. Believing the two men emerging simultaneously from separate exists were connected to the armed robbery, the deputies shined a flashlight, at gun point ordered Kraus to slowly put down the object and directed both men to raise their hands and kneel. It was quickly discovered that neither man met the description of the armed robber and that the object on the ground was in fact a cordless telephone. App. "C," pp. 27-28, 32, 37-38, 45-46. Both men then were told they could stand.

Dale Kraus and Todd Montgomery, as well as Rosetta and Cindy Kraus who were inside the house and who were not contacted by the deputies until after the incident, later brought suit in the United States District Court for the

Western District of Washington against Pierce County and the deputies involved, alleging jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(1), (2), (3) and (4) and asserting claims under 42 U.S.C. §§ 1981, 1983, and the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

Defendants moved for summary judgment on the grounds, inter alia, that there had been no arrest, probable cause existed, and the deputies were immune from suit. Defendants' motion was denied, and though on appeal the Ninth Circuit Court of Appeals directed the District Court to grant defendants' motion on the absence of an unlawful search, it affirmed the lower court's ruling on the issues of arrest, probable cause and immunity. The court also

dismissed Pierce County's appeal on the ground it was not based on the issue of qualified immunity and therefore was unappealable.

V. REASONS FOR GRANTING PETITION

A. The Court Should Settle The Split Among The Circuits On Whether State Police Lose Their Qualified Immunity By Relying On State Court Decisions Interpreting Federal Law.

In the instant case the Court of Appeals recognized that in suits against government officials, Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L.Ed.2d 396, 102 S. Ct. 2727 (1982) requires a finding of qualified immunity where an officer's conduct does not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." See Kraus v. County of Pierce, 793 F.2d 1105, 1108 (9th Cir. 1986). In its analysis of this issue, however, the Ninth Circuit

disregarded the decisions of the Washington State courts binding on officers. Such an approach ignores the coordinate authority of state courts to interpret and apply federal law and literally imposes a double standard on law enforcement officials.

This Court has expressly reserved the issue of what precedents should be considered in analyzing the "state of the law" to determine if a federal right is "clearly established." Harlow v. Fitzgerald, 457 U.S. at 818 n.32; Procunier v. Navarette, 434 U.S. 555, 565, 55 L.Ed.2d 24, 98 S. Ct. 855 (1978). The federal circuit courts either have avoided deciding the issue, e.g., Hopson v. Wilson, 737 F.2d 1, 25-26 (D.C. Cir. 1984); Zweibon v. Mitchell, 720 F.2d 162, 168-69 (D.C. Cir. 1983), or come to conflicting conclusions. In the Fourth

Circuit, conduct is deemed to violate "clearly established" federal rights if the issue has been "authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state. . . ." Wallace v. King, 626 F.2d 1157, 1161 (4th Cir. 1980). In contrast, the Ninth Circuit gives no weight to decisions of the state where the alleged violation occurred; it examines all available decisional law, and then only where there is an absence of "binding precedent" from the U.S. Supreme Court or Ninth Circuit. Ward v. County of San Diego, 791 F.2d 1329, 1332 (9th Cir. 1986).

Though here the Court of Appeals cited to neither a "binding" Supreme Court or Ninth Circuit precedent, it

nevertheless found the deputies' conduct violated clearly established federal constitutional rights. 793 F.2d at 1109-10. In so doing, the Ninth Circuit disregarded Washington case law which under similar circumstances had found no violation of federal rights. See State v. Gluck, 83 Wn.2d 424, 518 P.2d 703 (1974) (after learning that a tavern had been robbed, police arrested occupants of a car earlier seen pulling away from the tavern); State v. Young, 39 Wn.2d 910, 239 P.2d 858 (1952) (probable cause to arrest the occupants of a panel truck existed where it was discovered 10 blocks from the crime scene after a similar truck had driven through a service station moments before it was robbed); State v. Donohoe, 39 Wn.App. 778, 695 P.2d 150 (1985) (probable cause found to arrest

occupants of similar vehicle as that seen in the vicinity of a vehicle prowl hours earlier); State v. Wakeley, 29 Wn.App. 238, 628 P.2d 835 (1981) (occupants of a car seen near scene of shooting were not "arrested" though they were forced at gun point to kneel and be handcuffed). Hence probable cause or a mere investigatory stop, and therefore immunity, would have been found if Washington State was in the Fourth Circuit or if the deputies had been sued in Washington Superior Court rather than in a federal court within the Ninth Circuit.

Clearly the Supreme Court should settle what precedent controls, and petitioners assert the appropriate analysis examines case law binding on law enforcement officials -- not the precedent binding federal circuit courts. Such a rule is consistent with the rationale behind

qualified immunity that "a reasonably competent public official should know the law governing his conduct." Harlow v. Fitzgerald, 457 U.S. at 819. (Emphasis added.) The law governing the conduct of state officials in state court, the only forum in which most officers experience court review, is not established by the decisions of the federal circuit courts but by the United States Supreme Court and the local state appellate courts. See United States v. Woods, 432 F.2d 1072, 1075-76 (7th Cir. 1970); Owsley v. Payton, 352 F.2d 804, 805 (4th Cir. 1965). A state official is far more inclined to be concerned with the decisions binding on him in state court because state decisions often impose even greater limits on his conduct than necessitated by the federal constitution. See

Oregon v. Hass, 420 U.S. 714, 719, 95 S. Ct. 1215, 43 L.Ed.2d 570 (1975).

The analysis applied by the Ninth Circuit allows a plaintiff to control a defendant's immunity by his choice of forum, and ignores law binding on state officials. It imposes on them the duty to keep two sets of often differing interpretations of federal law -- the decisions of state courts binding on them in their daily activities and the decisions of the circuit court in those rare instances when their conduct is scrutinized in the federal system. Such a standard requires police to have the knowledge of legal scholars rather than that of competent officials who know "the law governing [their] conduct." The standard adopted by the Ninth Circuit will paralyze the activities of law

enforcement officers in just those situations where their actions must be quick and decisive to capture criminals, protect the public and protect themselves.

B. In Holding That The Deputies Did Not Have Probable Cause, The Court Of Appeals Is In Conflict With Decisions Of Other Federal Courts Which Have Found Probable Cause In Similar Circumstances.

Probable cause for an arrest exists where there are facts and circumstances "sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." Gerstein v. Pugh, 420 U.S. 103, 111, 43 L.Ed.2d 54, 95 S.Ct. 854 (1975); Beck v. Ohio, 379 U.S. 89, 91, 13 L.Ed.2d 142, 85 S.Ct. 223 (1964). Here, the Court of Appeals found that the deputies did not have probable cause to believe the occupants of plaintiffs' car had committed a robbery because they did not have

information linking them or their car to the crime scene. Kraus, 793 F.2d at 1109. Such a conclusion is in conflict both with the record and the decisions of other federal appellate courts when faced with similar facts.

The affidavits of the witnesses demonstrate specific and articulable links between the vehicle, the scene of the crime and the crime itself. First, the lot out of which the vehicle exited was in close proximity to the bank where the robbery took place. The bank and the parking lot were in the same shopping mall, App. "C," p. 1, the bank was just "across the way" from the Thriftco Store, App. "C," p. 6, and the parking lot between the bank and the store was clearly visible from the spot where the robbery was committed. App. "C," p. 4.

Second, the lot out of which the plaintiff's vehicle sped just moments before had been entered by an armed robber in direct flight from his crime. App. "C," pp. 4, 6, 25. Finally, plaintiff's vehicle not only was seen speeding away from this very same lot with a driver and one passenger soon after the robber's disappearance there, but also unlawfully ran two stop signs in the driver's haste to depart. App. "C," pp. 4, 13, 25.

That such links between the plaintiff's car, the robbery and crime scene amounted to probable cause to arrest is supported by similar cases from other federal appellate courts. E.g. Delesteine v. Beto, 418 F.2d 871, 872 (5th Cir. 1969) (probable cause existed where defendant and his vehicle matched the description of a man and automobile

seen at a murder scene); United States v. Mitchell, 457 F.2d 513, 514 (6th Cir. 1972) (where a witness lost sight of an escaping robber dressed as a woman and then saw a person with earrings in defendant's vehicle, probable cause supported the driver's arrest); United States v. Evans, 447 F.2d 129, 130-32 (8th Cir. 1971) (probable cause existed where defendant's vehicle was similar to a car seen leaving an alley behind a burgled post office sometime before the burglary was discovered); United States v. Troutman, 458 F.2d 217, 220 (10th Cir. 1972) (arrested occupants of a vehicle similar to the only car seen on the street at the time a burglar alarm sounded, though no license number was obtained and witnesses saw neither the burglary scene nor the vehicle leaving

it). See also Scearce v. Field, 292 F.Supp. 807 (C.D. Cal. 1968) (arrested occupant of car seen leaving alley behind burgled tavern a few minutes after an alarm sounded); Hamilton v. North Carolina, 260 F.Supp. 632 (E.D. N.C. 1966) (arrested persons found near car similar to one seen parked the day before at a burgled company).

Even if the deputies had no right to rely on binding state precedent, the facts of the instant case provide stronger circumstances to warrant a finding of probable cause than are present in many of the above federal decisions. At the very least, these prior federal precedents demonstrate that it was far from "clearly established" that the instant facts would not provide probable cause to arrest.

C. In Holding That The Plaintiffs Were Arrested, The Court Of Appeals Disregarded The Distinction Between Types Of Seizures And Ignored Its Own Precedent.

It is well settled that where police have reasonable suspicion, grounded in specific and articulable facts, that a person was involved in or is wanted in connection with a completed felony, they may make an investigatory stop in the absence of probable cause to arrest. United States v. Hensley, 469 U.S. ____, 83 L.Ed.2d 604, 612, 105 S.Ct. 675 (1985); Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968). The Ninth Circuit however found that the instant seizure exceeded the bounds of a lawful investigatory stop and constituted an arrest because an "innocent person could reasonably have believed he was not free to go and he was being taken into

custody indefinitely." Kraus v. County of Pierce, 793 F.2d at 1109. Such an analysis and conclusion is contrary to both the principles enunciated by this Court and the Ninth Circuit's previous application of those principles.

A noted authority has explained that this approach to analyzing when one is arrested would:

> . . . create a test which would cast doubt upon most stops. The typical stopping for investigation cannot be viewed as anything but a complete restriction of liberty of movement for a time. . . . A stopping for investigation is not a lesser intrusion, as compared to an arrest, because the restriction on movement is incomplete, but rather because it is brief when compared to arrest, which (as emphasized in Terry) "is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows."

3 W. LaFave, Search and Seizure, § 9.2 at 29-30 (1978). Indeed, this Court has

stated that the determination of when a seizure becomes an arrest is not rigidly controlled by the extent of the restriction but by whether the investigative detention is 1) temporary and lasts no longer than is necessary to effectuate the purpose of the stop, and 2) the investigative methods employed are the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. Florida v. Royer, 460 U.S. 491, 500, 75 L.Ed.2d 229, 103 S.Ct. 1319 (1983). See also, United States v. Montoya De Hernandez, 473 U.S. _____, 87 L.Ed.2d 381, 392, 105 S.Ct. 3304 (1985); United States v. Sharpe, 470 U.S. ____, 84 L.Ed.2d 605, 105 S.Ct. 1568 (1985).

Decisions with circumstances similar to those at bar demonstrate that the duration of plaintiffs' investigative

detention and the methods employed were reasonable. Here the record reveals that less than five minutes elapsed from the time the dispatcher called to the time plaintiffs were allowed to stand after questioning. App. "C," pp. 28, 47. Such an intrusion is clearly "de minimus" and insufficient to convert an otherwise valid stop into an arrest. See State v. Jackson, 296 Ore. 430, 677 P.2d 221-226 (1984); State v. Hewey, 144 Vt. 636, 471 At.2d 236, 238-39 (1983).

Similarly, the investigative methods employed by the deputies were the least intrusive means reasonably available to verify or dispel suspicion in a short period of time. Here the issue is not the investigatory methods used per se, but the precautions the deputies took to

protect themselves from suspected armed robbers while conducting their investigation. Police officers' drawing of their guns has been upheld as part of a reasonable investigatory stop where there is information that the suspect is armed and dangerous. United States v. Hensley, 83 L.Ed.2d at 616; United States v. Thompson, 558 F.2d 522, 524 (9th Cir. 1977), cert. denied, 435 U.S. 914 (1978). The relevant inquiry then is whether a reasonably prudent man would be warranted in the belief that his safety, or that of others, was in danger. See Terry v. Ohio, 392 U.S. at 27.

Here the deputies knew that 1) the suspect was armed; 2) earlier that evening he had threatened to use the gun in a robbery; 3) he had fled on foot into an adjoining parking lot and 4) moments

later a driver and passenger were seen in plaintiff's car racing away in an unlawful manner from the lot in the immediate vicinity of the robbery in an apparent continuation of the assailant's escape. App. "C,", pp. 13, 25, 43-44. Hence when two men left the house, where the owner of the car lived and where that car was presently parked, by separate exists contrary to the dispatcher's instructions and moved rapidly towards the officers with an object feared to be a weapon in one of the men's hands, App. "C," pp. 27, 31-32, 37, 45, the deputies had reasonable suspicion that the two men emerging from the house, were connected to the crime and might very well be armed, dangerous and attempt to escape.

A seizure is not unreasonable just because "the protection of the public

might, in the abstract, have been accomplished by 'less intrusive means.'" United States v. Montoya De Hernandez, 87 L.Ed.2d at 392; United States v. Sharpe, 105 S.Ct. at 1576. However, considering the circumstances indicating a definite threat to both the public and the deputies, it would have been reckless to have taken any less protective measures than those actually taken here.

Even assuming for the sake of argument that the deputies made an "arrest" without probable cause, it cannot be said their conduct violated "clearly established" rights. In United States v. Taylor, 716 F.2d 701 (9th Cir. 1983) the Ninth Circuit, a year before the circumstances presented here, upheld officers drawing of their weapons in self-protection where they had been told

the defendant was dangerous. That the suspect then was required to lie down at gun point, be handcuffed, searched and left in that position for three to five minutes was held by the Ninth Circuit not to convert the seizure into an arrest because "the restrictions eliminated the possibility of an assault or attempt to flee, particularly if an arrest became imminent." 716 P.2d at 709. See also, State v. Wakeley, 29 Wn.App. at 240-43 (kneeling and handcuffing do not amount to an "arrest"). Here the deputies knew the robber was armed and had earlier escaped, yet unlike Taylor the deputies only required plaintiffs momentarily to raise their hands, kneel and answer questions. Although the deputies had the right to rely on the Ninth Circuit's previous decision, the appellate court

ignored Taylor when it was raised in defendants' motion for rehearing and made no effort to explain this contrary precedent in its amended opinion.

Plaintiffs' investigatory stop was not transformed into an arrest by the deputies' conduct. Their precautions were less intrusive and shorter in duration than those in Taylor and were justified by the reasonable belief that the suspects were armed, dangerous and likely to attempt an escape. At the very least, Taylor demonstrates such conduct had in fact been "clearly established" as constitutional by the Ninth Circuit and that the deputies had the right to conform their conduct to its holding.

D. Once An Appellate Court Has Taken Jurisdiction Over An Appeal From A Denial Of Summary Judgment On The Issue Of Qualified Immunity, It Also Has Pendent Appellate Jurisdiction Over The Governmental Employer

Regarding The Overlapping Issues Of The Presence of An Arrest And Probable Cause.

The Ninth Circuit dismissed Pierce County's appeal on the ground that the automatic appealability of summary judgments involving immunity did not apply to governmental employers. Kraus, 793 F.2d at 1108. Pierce County's appeal, like that of the deputies on the issue of qualified immunity, raises the issue that plaintiffs' rights against unreasonable seizure were not violated. Because the resolution of this issue in favor of the deputies could collaterally estop relitigation of the claim against Pierce County and even necessitate a directed verdict, judicial resources would be wasted by dismissing Pierce County's appeal.

In San Filippo v. U.S. Trust Co. of New York, 737 F.2d 246, 255 (2nd Cir. 1984) the court found that it had pendent appellant jurisdiction over otherwise nonappealable issues where it had jurisdiction over an interlocutory order denying a claim of immunity. There the court held that "once we have taken jurisdiction over one issue in a case, we may, in our discretion, consider otherwise nonappealable issues in the case as well, where '[t]here is sufficient overlap and the fact is relevant to [the appealable and nonappealable] issues to warrant our exercising plenary authority over [the] appeal.'" San Filippo, supra.

Such an overlap exists in the instant case. In analyzing the deputies' appeal of whether "clearly established" rights were violated, a court must

determine whether there was an arrest and if it was based on probable cause. These same issues are raised by Pierce County's appeal and the Ninth Circuit erred in failing to recognize its discretion to grant pendent appellant jurisdiction so as to avoid the waste of judicial resources.

VI. CONCLUSION

For the reasons stated above, a writ of certiorari to the United States Ninth Circuit should issue.

Respectfully submitted,

JOHN W. LADENBURG,
PIERCE COUNTY PROSECUTOR

By

_____
DOUGLAS W. VANSCOY,
Deputy Prosecutor

By

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DANIEL R. HAMILTON,
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TABLE OF CONTENTS

APPENDIX "A":

Amended Opinion..... 1

Order..... 20

APPENDIX "B":

Order..... 1
(Filed October 29, 1986)

Order..... 2
(Filed August 18, 1986)

Order..... 3
(Filed January 14, 1986)

Order..... 4
(Filed September 6, 1985)

Minute Order..... 6
(Filed September 10, 1985)

Order Granting Leave to File
Amended Complaint..... 8
(Filed August 1, 1985)

APPENDIX "C":

Affidavit of James Joseph Brennan.. 1

Affidavit of Robert Paul Kay, Jr... 3

Recording made by LESA 1/29/85..... 6

Affidavit of Kenneth Tucker..... 23

Affidavit of Dale E. Kraus..... 30

Affidavit of Todd Montgomery..... 35

Affidavit of Richard Rice..... 39

Affidavit of Richard Shadduck..... 48

APPENDIX "D":

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED:

A. U.S. Const. amend. IV..... 1

B. 42 U.S.C. § 1983..... 1

FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DALE E. KRAUS and ROSETTA M. KRAUS, husband and wife; CINDY D. KRAUS, individually; and TODD W. MONTGOMERY, individually,	No. 85-4190 D.C. #CV-84-870-T
Plaintiffs-Appellees,	AMENDED OPINION
v.	
COUNTY OF PIERCE, ET AL.,	
Defendants-Appellants.	

Appeal from the United States District Court
for the Western District of Washington
Jack E. Tanner, District Judge, Presiding
Argued and submitted June 4, 1986
Seattle, Washington

Before: WRIGHT, SNEED, and SCHROEDER,
Circuit Judges.

SCHROEDER, Circuit Judge.

This is a 42 U.S.C. § 1983 action against several Pierce County Sheriff's Deputies and the County of Pierce for damages arising out of an allegedly unlawful seizure of the plaintiffs and search of their home. This appeal is from the

Appendix "A"

PUBLISHER'S NOTE:

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plaintiffs. See, e.g., Water West, Inc. v. Entek Corp., 788 F.2d 627, 628-29 (9th Cir. 1986).

Plaintiffs are Dale and Rosetta Kraus, their daughter Cindy Kraus, and a friend, Todd Montgomery. On the evening of September 29, 1984, the plaintiffs were in the Kraus residence watching television when Dale Kraus received a phone call from a dispatcher of the Pierce County Sheriff's Office. The dispatcher instructed Kraus to come outside the house for interrogation by awaiting officers. There is nothing in the record to indicate that any of the plaintiffs knew of any reason why any one of them could be the object of such an interrogation.

Kraus obeyed the instruction to go outside, and Montgomery followed. Upon exiting the home, the two found themselves bathed in floodlights and surrounded by at least five sheriffs' deputies, some of whom had weapons drawn. The deputies ordered Kraus and Montgomery to put their arms over their heads and drop to their knees. After

some period of observation, the deputies informed the plaintiffs that neither Kraus nor Montgomery, both of whom are white males, fit the description of the robber for whom they were looking, a black male. The deputies then informed the plaintiffs that they desired to ask them some questions. At Mrs. Kraus' suggestion, the deputies conducted the questioning inside the house and eventually left the premises.

What prompted the plaintiffs' frightening confrontation with the police was a robbery earlier in the evening in which the plaintiffs were not in any way involved. An armed black male committed the robbery at a First Interstate Bank machine in the Villa Plaza shopping mall in Pierce County. The robbery occurred at approximately 8:00 p.m. on a Saturday night. Robert Kay saw the robbery and spoke to the victim just after it had occurred. Kay then chased the robber who ran into a crowded drug store parking lot some distance from the machine.

Kay then apparently lost sight of the robber, but observed a red hatchback automobile leave the parking lot at a rapid speed. He stated in his affidavit that the car "rolled through the stop signs where the parking lot enters onto Bristol Avenue and where Bristol Avenue meets 100th Street Southwest" and that it "accelerated rapidly eastbound on 100th Street." He followed the car long enough to write down the license plate number, "Kraus 2", and then reported the robbery and license number to the sheriff's office.

The sheriff's office used the information to determine the address of the owners of the car and made no further inquiries of Kay. The officers did not ask Kay whether any occupant of the vehicle looked like the robber, or why he believed the car was connected with the robbery. It immediately dispatched several deputies to the address of the car's owners, the plaintiffs Kraus.

When the deputies arrived, they saw the hatchback parked at the house and determined that

its hood was still warm. The deputies decided to surround the front of the house, draw their weapons, bring the occupants out of the house, shine floodlights on them, and then interrogate them. This action was based only upon the observation that the hood of the hatchback was warm and information that the hatchback had sped away from the crowded parking lot shortly after a robbery suspect had entered the parking lot on foot.

Plaintiffs filed this civil rights action, and the defendants moved for summary judgment on various theories. All the motions were denied, and the defendants appeal, arguing that the motions should have been granted.

JURISDICTION

As a general rule, "the denial of a Rule 56 motion is an interlocutory order from which no appeal is available until the entry of judgment following the trial on the merits." Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2715, at 636 (1983); see, e.g., Simons

v. United States, 497 F.2d 1046, 1050 (9th Cir. 1974). The Supreme Court has noted, however, that qualified immunity "is an immunity from suit rather than a mere defense to liability . . . ." Mitchell v. Forsyth, 105 S. Ct. 2806, 2816 (1985) (emphasis in original). It has therefore held that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." Id. at 2817.

The motion of the deputies was based on qualified immunity and the district court's denial comes within the Mitchell exception to the general rule of nonappealability. The issue, however, is narrow. As the Court stated in Mitchell, "the appealable issue is a purely legal one, whether the facts alleged (by the plaintiff, or, in some cases, the defendant) support a claim of violation of clearly established law." Id. at 2816 n.9.

When the complaint alleges acts constituting a plain violation of law which has a settled substantive content, the defendant is entitled to summary judgment if he makes a showing by affidavit or otherwise that he did not commit those acts and "discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts." Id. at 2816. We thus hold that the denial of the deputies' motion for summary judgment is appealable for purposes of testing whether the defendant has demonstrated entitlement to summary judgment on grounds of qualified immunity.

The denial of the County's motion for summary judgment is not appealable, however. This motion was based primarily on the County's assertion that there was no policy or practice of unreasonable searches and seizures. It was not based on immunity and therefore does not fall within the Mitchell exception. The issues on appeal are thus limited to those raised by the deputies' motion on

qualified immunity grounds.

DISCUSSION

Qualified immunity is a defense to lawsuits against governmental officials arising out of the performance of their duties. Its purpose is to permit such officials conscientiously to undertake their responsibilities without fear that they will be held liable in damages for actions that appear reasonable at the time, but are later held to violate statutory or constitutional rights. Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982); Pierson v. Ray, 386 U.S. 547, 554 (1967). According to the test for qualified immunity established by the Supreme Court, the deputies in this case are immune from liability (and trial) if "their conduct [did] not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818.

Plaintiffs contend that when Kraus and Montgomery left the house and were surrounded by officers with drawn weapons and floodlights, the

pair was arrested, and, further, that this seizure was not supported by probable cause. The deputies assert that there was no seizure in violation of established law and that in asking Kraus to come outside they reasonably believed that they performed an investigative stop for which probable cause is not required. See Terry v. Ohio, 392 U.S. 1 (1968).

In Terry v. Ohio, however, investigative stops were justified as "necessarily swift action predicated upon on-the-spot observations of the officer on the beat -- which historically had not been, and as a practical manner could not be, subjected to the warrant procedures." Thus, a suspect may be stopped for a "limited inquiry and weapons frisk." United States v. Beck, 598 F.2d 497 (9th Cir. 1979).

Investigative stops based upon suspicion short of probable cause are therefore constitutionally permissible only where the means utilized are the least intrusive reasonably available.

"[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed would be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." Florida v. Royer, 103 S. Ct. 1319, 1325-26 (1983).

Where more than a limited intrusion occurs, an arrest occurs and probable cause is required.

> Because detention represents only a limited intrusion, it can be justified by a reasonable suspicion of criminal activity. However, that suspicion justifies only a brief stop and interrogation and, under proper circumstances, a brief check for weapons. If the seizure involves anything more than the brief and narrowly defined intrusion authorized by Terry, it must be justified by probable cause.

Gonzales v. City of Peoria, 722 F.2d 468, 477 (9th Cir. 1983) (citations omitted). When the line between a Terry stop and an arrest is crossed "depends on all of the surrounding circumstances, including the extent that freedom of movement is

curtailed and the degree and type of force or authority used to effectuate the stop." United States v. Harrington, 636 F.2d 1182, 1186 (9th Cir. 1980). But our circuit has made it clear that where force is used such that the innocent person could reasonably have believed he was not free to go and that he was being taken into custody indefinitely, an arrest has occurred. See, e.g., United States v. Patterson, 648 F.2d 625, 632-34 (9th Cir. 1981).

Applying these principles to this case, we conclude that a seizure more intrusive than an investigatory stop occurred. The officers turned spotlights on Kraus and Montgomery and confronted them with weapons at the ready. In addition, the officers' commands led Kraus and Montgomery reasonably to believe that they had no choice but to raise their arms and drop to their knees. A reasonable person in this situation would have believed that he was not free to leave and was effectively under arrest. See, e.g., United States

v. Al-Azzawy, 784 F.2d 890, 893 (9th Cir. 1985) (arrest occurred at time that officers surrounded appellee's trailer with weapons drawn), cert. denied, 106 S. Ct. 2255 (1986); United States v. Vasquez, 638 F.2d 507, 522 (2nd Cir. 1980) (arrest occurred at time officers leveled their guns at defendants and ordered them out of their cars), cert. denied, 450 U.S. 970, 454 U.S. 847, 454 U.S. 975 (1981). See also United States v. Morgan, 743 F.2d 1158 (6th Cir. 1984), cert. denied, 105 S. Ct. 2126 (1985); United States v. Strickler, 490 F.2d 378, 380 (9th Cir. 1974) ("we simply cannot equate an armed approach to a surrounded vehicle whose occupants have been commanded to raise their hands with the 'brief stop of a suspicious individual in order to determine his identity or to maintain the status quo momentarily while obtaining more information'").

Since it is well established that such a seizure is unlawful if not supported by probable cause, see, e.g., Wong Sun v. United States, 371

U.S. 471, 479 (1963); United States v. Jit Sun Loo, 478 F.2d 401, 405 (9th Cir. 1973), the issue is the existence of probable cause, or, more precisely, within the context of the immunity defense, whether a reasonable officer would have believed that there was probable cause to effect the seizure.

The information upon which the deputies acted did not amount to probable cause to believe that the occupants of the house had committed a robbery. The officers would have had probable cause to arrest Kraus and Montgomery if they had information linking them or their car to the crime scene. See, e.g., United States v. Darland, 659 F.2d 70, 72 (5th Cir. 1981), cert. denied, 454 U.S. 1157 (1982) (by identifying himself to officers, appellant provided link to getaway car necessary to give probable cause to arrest); United States ex rel. Pella v. Reid, 527 F.2d 380, 382 (2nd Cir. 1975) (lack of evidence linking petitioner's car to the crime is fatal to a find-

ing of probable cause to arrest). The only information available to the deputies was that Kraus' car had rapidly exited a crowded parking lot near the robbery shortly after the robbery suspect had entered the parking lot on foot. This information was insufficient to link the car or its occupants to the robbery itself or to its scene.

The cases upon which the deputies rely contain such a link and therefore do not support the defendants' contention that there was probable cause in the circumstances of this case. All of these cases involved a valid arrest of the driver of a vehicle directly connected either to the crime or its scene. For example, in United States v. Troutman, 458 F.2d 217 (10th Cir. 1972), the vehicle was the only car in sight after a robbery at three o'clock in the morning in a small town. Id. at 218. By contrast, the car in this case emerged from a crowded parking lot. It was by no means the only car in sight. The vehicle in Hamilton v. North Carolina, 260 F.Supp. 632 (E.D.

N.C. 1966), aff'd, 382 F.2d 296 (4th Cir. 1967), had been seen at the site of the robbery, id. at 633, not at a parking lot some distance from the crime scene. See also Chambers v. Maroney, 399 U.S. 399 U.S. 42 (1970) (vehicle seen circling block in vicinity of service station that was later robbed and seen speeding away at time of robbery; description of individuals in car matched that of robbers given by victim); Scearce v. Field, 292 F.Supp. 807 (C.D. Cal. 1968) (vehicle seen at scene of robbery at time burglar alarm went off, and leaving scene immediately thereafter). In United States v. James, 496 F.Supp. 284 (W.D. Okla. 1977), the police obtained a description of the vehicle by describing the suspect to a parking lot attendant who said he saw the suspect park that vehicle. An employee of a garage had told the police that the suspect was the only individual to use the pay phone to which the incriminating call had been traced. Id. at 286. The deputies did not have such particular-

ized information in the instant case. Thus, in each of the cases cited by the deputies, the link between the vehicle and the crime, or the occupant of the vehicle and the crime, was far more substantial than in the case at bar.

We therefore hold that, viewing the facts in the light most favorable to the plaintiffs, a reasonable officer would not have believed he had probable cause to effect this seizure of Kraus and Montgomery, and the officers reasonably should have known that their conduct violated clearly established constitutional rights. The district court properly declined to grant the officers' motion for summary judgment as to the illegal arrest claim.

The remaining issue in this case relates to the alleged search of the house which followed the confrontation outside. The relevant facts are not in dispute. Both parties' affidavits reveal that after realizing their mistake, the deputies explained the situation to the plaintiffs, indicated

that they wished to ask some further questions, and then proceeded into the house at Mrs. Kraus' suggestion. Thus, there is no question that the deputies entered the house only upon the consent of someone with authority to permit entry. Cf. Stoner v. California, 376 U.S. 483 (1964) (hotel clerk cannot validly consent to search of guest's room). Once in the house, the deputies were free to observe everything in plain view. See generally Coolidge v. New Hampshire, 403 U.S. 443, 465-71 (1971) (discussing circumstances under which police may seize objects in plain view from place where they have a right to be). The plaintiffs' affidavits do not reveal that anything more occurred. Specifically, there is no allegation that the deputies rifled through any of the Kraus' possessions or opened any doors, drawers, or cabinets. Thus, even after viewing the facts in the light most favorable to the plaintiffs, we hold that the deputies did not violate any right of which a reasonable officer could have known.

The district court erred in declining to grant summary judgment as to the illegal search claim.

Reversed in part, affirmed in part; each side to bear its own costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DALE E. KRAUS and ROSETTA M. KRAUS, husband and wife, et al.,	)	No. C84-870T
Plaintiff,	)	
-vs-	)	
COUNTY OF PIERCE, a political subdivision of the Stae [sic] of Washington, et al.,	)	ORDER
Defendant.	)	

THIS MATTER comes on before the above-entitled Court upon Defendant's Motion for Summary Judgment.

Having considered the entirety of the records and file herein, the Court now rules as follows:

1. Summary Judgment is appropriate only if there are no genuine issues of material fact. Rule 56(c).

2. The movant has the burden of establishing that no genuine issues of material fact exist. British Airways Board v. Boeing Co., 585 F.2d 946,

951 (9th Cir. 1978).

3. Once the movant has met this burden, the non-movant must set forth specific facts showing there are genuine issues for trial. Rule 56(e). Thus, the burden of presenting evidence shifts to the non-movant.

4. The evidence must be viewed in a light most favorable to the non-movant. De Los Santos v. Scindia Steam Navigation Co., 598 F.2d 480 (9th Cir. 1979), aff'd 101 S.Ct. 1614 (1981).

5. The existence of genuine issues of material fact precludes summary judgment and Defendant's Motion is accordingly, DENIED.

The clerk of the court is instructed to send uncertified copies of this Order to all counsel of record.

DATED this 20th day of September, 1985.

JACK E. TANNER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DALE E. KRAUS and ROSETTA M. KRAUS, husband and wife; CINDY D. KRAUS, individually; and TODD W. MONTGOMERY, individually,	No. 85-4190
	D.C. #CV-84-870-T (Western Washington)
Plaintiffs-Appellees,	
v.	ORDER
COUNTY OF PIERCE, ET AL.,	
Defendants-Appellants.	
	Filed 10/29/86

Before: WRIGHT, SNEED, and SCHROEDER, Circuit Judges

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DALE E. KRAUS, et al.,	)	No. 85-4190
Plaintiffs-Appellees,	)	DC# CV-84-870-T
vs.	)	
COUNTY OF PIERCE, et al.,	)	ORDER
Defendants-Appellants.	)	Filed 8/18/86

Before: WRIGHT, SNEED, and SCHROEDER, Circuit Judges.

The petition for rehearing, with suggestion for rehearing en banc, already received, shall be filed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DALE E. KRAUS and ROSETTA M. KRAUS, husband and wife, et al.,	No. 85-4190
Plaintiffs-Appellees,	DC# CV-84-870 JET Western Washington (Tacoma)
vs.	
COUNTY OF PIERCE, a political subdivision of the State of Washington, et al.,	ORDER
Defendants-Appellants.	Filed 1/14/86

Appellants' motion of December 26, 1985 for a 14-day extension of time in which to file the opening brief is granted. The opening brief shall be filed on or before January 14, 1986.

This order is subject to reconsideration by a judge if any opposition is filed within ten (10) days of the entry of the order.

For the Court:

Susan M. Johnson
Motions Attorney/Deputy Clerk
Local Rule 22

MA 1/8/86

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KALE E. KRAUS and ROSETTA M. KRAUS, husband and wife; et al.,	)	No. C84-870T
Plaintiff,	)	
vs.	)	O R D E R
COUNTY OF PIERCE, a political subdivision of the State of Washington, et al,	)	
Defendant.	)	
	)	Filed 9/6/85

United States District Court Judge Donald S. Voorhees has referred the above entitled matter to United States Magistrate Franklin D. Burgess pursuant to 28 U.S.C. § 636(b)(1)(A) and local Magistrates Rule MR3.

This matter comes forward upon the defendants' motion to stay discovery. The court having considered the motion, affidavit and memorandum of the defendants, and upon reviewing the court file and finding that the plaintiffs would not be pre-

judiced thereby, it is hereby

ORDERED that discovery be stayed until the defendants' motion for summary judgment, scheduled for hearing on September 13, 1985, has been determined.

DATED this 6 day of September, 1985.

UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DALE E. KRAUS, etal	)	
Plaintiffs,	)	CAUSE NO. C84-870T
vs	)	
	)	MINUTE ORDER
COUNTY OF PIERCE, etal	)	
Defendants.	)	
	)	Filed 9/10/85

The following Minute Order is made by the direction of the Court, the Honorable Donald S. Voorhees, U.S. District Judge:

The motion of defendants to stay discovery or in the alternative to vacate notice of deposition and quash deposition subpoena's shall be referred to Magistrate Franklin D. Burgess for this limited purpose only pursuant to 28 U.S.C. s. 636(b)(1)(a) and Local Rule MR 3(a) and (b).

Filed and entered this 6 day of September, 1985.

BRUCE RIFKIN, Clerk

by

Deputy Clerk

Approved by: Donald S. Voorhees
September 6, 1985

Appendix "B"

LAW OFFICES OF MONTE E. HESTER
Attorneys for Plaintiffs
1008 South Yakima Avenue
P.O. Box 5366
Tacoma, Washington 98405
(206) 272-2157

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DALE E. KRAUS and ROSETTA M. KRAUS, husband and wife; CINDY D. KRAUS, individually; and TODD MONTGOMERY, individually,	)	No. C84-870T
Plaintiffs,	)	
vs.	)	ORDER GRANTING LEAVE TO FILE AMENDED COMPLAINT
COUNTY OF PIERCE, et al, et ux,	)	
Defendants.	)	Filed 8/1/85

THIS CAUSE having come before the Court on Plaintiffs' Motion for Leave to Amend Complaint, and it appearing that justice requires that such leave be given, and the Court being fully advised,

IT IS ORDERED that Plaintiffs are hereby

granted leave to file their Amended Complaint.

DATED this 1st day of August, 1985.

JACK E. TANNER
U.S. District Court Judge

Presented by:

LAW OFFICES OF MONTE E.
HESTER, INC., P.S.

By: _____
Randall L. Hansen
For Monte E. Hester
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DALE E. KRAUS and ROSETTA M. KRAUS, husband and wife; CINDY D. KRAUS, individually; and TODD MONTGOMERY, individually, Plaintiffs, v. COUNTY OF PIERCE, et al, et ux, Defendants.	No. C84-807T AFFIDAVIT OF JAMES JOSEPH BRENNAN

STATE OF WASHINGTON)
) ss.
COUNTY OF PIERCE)

JAMES JOSEPH BRENNAN, being first duly sworn, on oath deposes and states:

1. That I am James Joseph Brennan, and have personal knowledge of the facts herein set forth.

2. That on September 29, 1984, at approximately 7:50 in the evening, I was robbed by a black man as I was using the bank machine at the First Interstate Bank in the Villa Plaza shopping

Appendix "C"

mall in Lakewood, Washington. After I had used the bank machine, I put the money in my wallet and I heard someone behind me say "Give me all the money you have right now." I said, "All of it?" And the person said, "That's right, all of it." The robber had a short silver automatic with a curved handle in his right hand and it was pointed directly at me. I reached in my wallet and gave the money to the person, who promptly said, "That's not all of it." I then opened up my wallet and said, "That's all there is, do you want the wallet, too?" At that point, the man walked away. Just then, a man drove up whom I told that I had been robbed. This man then left in his car in pursuit of the robber.

Further your affiant sayeth naught.

_____

JAMES JOSEPH BRENNAN

SUBSCRIBED and SWORN to before me this 4th day of August, 1985.

_____

Notary Public, in and for the State of Washington, residing at Tacoma.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DALE E. KRAUS and ROSETTA M. KRAUS, husband and wife; CINDY D. KRAUS, individually; and TODD MONTGOMERY, individually, Plaintiffs, v. COUNTY OF PIERCE, et al, et ux, Defendants.	No. C84-807T AFFIDAVIT OF ROBERT PAUL KAY, JR.

STATE OF WASHINGTON)
) ss.
COUNTY OF PIERCE)

ROBERT PAUL KAY, JR., being first duly sworn, on oath deposes and states:

1. I am Robert Paul Kay, Jr., and have personal knowledge of the facts herein set forth.

2. That on September 29, 1984, at approximately 7:50 in the evening, I drove up to the First Interstate Bank cash machine located in the

Villa Plaza shopping mall in Lakewood, Washington. At that time, I saw a white male and a black male who appeared to be talking. When I got out of my car, the black male ran in a northeast direction into the Villa Plaza Thriftco parking lot. The white male told me that the black male had just robbed him.

I attempted to follow the black male by driving to the Thriftco parking lot where I had last seen him. I saw a red hatchback-type car rapidly leaving the lot. I followed it as it rolled through the stop signs where the parking lot enters onto Bristol Avenue and where Bristol Avenue meets 100th Street Southwest. The car I was following then accelerated rapidly eastbound on 100th Street. I was able to note the license plate as being "KRAUS 2". I then drove straight to the Lakewood precinct of the Pierce County Sheriff's Office and reported all of which I related above to the Pierce County Sheriff's

Office at approximately 7:52 in the evening.

Further your affiant sayeth naught.

_____
ROBERT PAUL KAY, JR.

SUBSCRIBED and SWORN to before me this 13 day of August, 1985.

_____
Notary Public, in and for the State of Washington, residing at Seattle.

February 6, 1986

This recording is being made 1/29/85 by Gerald Petrequin from the master logging recorder at the LESA Communication Center. The recording is in regards to incident number 84273500 a robbery that occurred at 1952 hours 9/29/84.

Lesa:	Hello
Victim:	Yes.
Lesa:	This is the Police Department.
Victim:	Yes, this is James Brennan calling here - I'm at the Thrifco Store right now and I was held up at gun point outside of First Interstate Bank across the way.
Lesa:	How long ago?
Victim:	About 5 minutes ago.
Lesa:	What is the address of the Thrifco your at, do you know?
Victim:	Villa Plaza?
Lesa:	Were any weapons used?
Victim:	Yes a hand gun.
Lesa:	Lesa operator calling radio.
Lesa:	I have a man calling from the Thrifco store in Villa Plaza - I

can't find in the computers - he says he was held up 5 minutes ago at gun point by the First Interstate Bank.

Radio: What did the suspect look like?

Victim: He was a black man about 5 - 10

Radio: How old?

Victim: Probably 25 to 30.

Radio: Was he in a car?

Victim: He was on foot at the time and he ran toward the J.C. Penneys store I don't know if he got in a car or not.

Radio: What was he wearing?

Victim: He had on - I believe it was jeans, a wind breaker and a baseball type hat.

Radio: What color was the windbreaker?

Victim: It was a dark color.

Radio: What kind of a weapon did he have?

Victim: It was a small automatic type hand gun, silver color.

Radio: Stay on the phone.

Radio: Sir did he seem medium or did he seem heavy?

Victim: Slimmed and medium type build.

Radio: And are you at the Thrifco now?

Victim: Yes.

Radio: Did he get any money from you sir?

Victim: About $55.00.

Radio: Did he put it in anything?

Victim: I didn't notice if he did or not. I didn't see anything else in his hand I think he put it in his pocket.

Radio: Did he have any facial hair or glasses? Scars or marks or anything?

Victim: He wasn't wearing any glasses, facial hair - I wasn't really looking that close at.

Radio: Are you hurt at all?

Victim: No. Just shook up a little bit

Radio: Did he have his hair in an afro or braids or what, do you remember?

Victim: I could not tell, he had on a baseball cap.

Radio: Do you know what color it was?

Victim: No

Radio: Did it say anything on it at all, can you remember?

Victim: It had some writing - I believe - but I really wasn't paying close attention of that.

Radio: Okay, stay on the phone until the Deputy arrives, we have several on the way there now, you didn't see him get into a car at all?

Victim: No, there was another gentleman that pulled in behind me right after this happened, and I explained to him what happened and he drove toward the direction the guy was running. I don't see the man out there now, he may show up here I parked my car in an unusual place hopeing he would see it.

Radio: What kind of car is this man in?

Victim: It was a full size, the exact kind I really don't

Radio: Do you know what color?

Victim: Blue color I believe - he drove off towards where the man was running to. Then I ran to my car and drove over here.

Radio: Is the man in the blue car white or black?

Victim: White man.

Radio: Do you know what he was wearing?

Victim: No I really didn't notice, it was sort of me yelling to him what had

happened and he got in his car and went in that direction and I got in mine and came over here.

Radio: What is your last name James?

Victim: Brennan

Radio: And what is your home address?

Victim: 2512 C Woods Drive

Radio: Do you know the telephone number you are calling from?

Victim: Hold on a moment, victim asks someone what the number is. 588-2157.

Radio: Are you at the front desk there?

Victim: Yes I'm right in the front of the store.

Radio: Is a deputy there now, can you see him?

Victim: No I do not, I am standing at the big window I don't see anyone yet.

Radio: We have some out in the area, I'll just stay on the phone until they arrive.

Victim: Okay.

Radio: Are there any deputies outside there yet?

Victim: One just walked in.

Radio: Why don't you go and talk to him I'll let you go. Thank you.

159: I'm at the Villa Plaza center reporting a robbery that just occurred at the First Interstate Bank of Villa Plaza a white male may be in pursuit of a black male suspect.

Radio: All west side cars report of a possible armed robbery just occurred at the First Interstate Villa Plaza, white male possibly chasing a black male suspect.

159: A possible vehicle involved unknown how, red volkswagon rabbit type vehicle. Vanity plate - KRAUS 2 - northbound on - no I guess it would be eastbound on 100th.

Radio: Received.

? Time lapse on the vehicle.

? About 2 minutes or a minute and a half.

Radio: For units responding to the armed robbery have the victim on the phone - suspect described as a black male 25 to 30 - 5 10 - slender build - wearing a dark colored windbreaker, blue jeans, armed with a small silver automatic. The victim didn't see any vehicle - said he was on foot towards Penney's.

?. Can you get a registration on that vehicle?

Radio: Its started.
Victim is now calling from the Thrifco in the Villa.

126: Time since original robbery took place?

Radio: Advising me 5 minutes.

? Why don't we shut the beeper down and go to channel 3?

Radio: County will be clear on the beeper all units from the armed robbery to channel 3, channel 3 is secured 1955.

204: 204 County is S o a

126: 126 159 where are you at now?

Radio: Registration comes back to an 83 Honda Civic - a Dale Kraus at 9004 Lorraine Avenue South.

126: Received.

? Is 159 with the victim?

? Negative.

? Proceed I will contact the victim, is he still at Thrifco?

Radio: Affirmative.

126: Could you give me the suspect description again, we are going to go check that house on Lorraine.

Radio: Black male, 25 to 30 5 10, slim to medium, was wearing a baseball cap, dark windbreaker, blue jeans, armed with a small silver handgun.

126: Received. (Unintelligible)

159: Got the suspect vehicle - it looks pretty good, it ran a stop sign leaving the area, 2 occupants, and was last seen heading eastbound on 100th passing bridgeport and he turned off, the witness turned off to come up here, to the precinct. There is a lag inbetween the time he saw the suspect on foot started driving through the parking lot looking for him and then saw the vehicle leave the villa, but it ran a stop sign and took off quick rapidly.

Radio: Black guys in the car or does he know?

159: He couldn't tell, he could only see the silhouette. Anybody running that?

Radio: Yes we did, it come back over Lorraine address.

Radio: Talked to 159 on the phone he advised that its a good possibility this vehicle was involved - our

witness that reported this to the precinct observed the volkswagon run a stop sign, had two occupants in the car, was eastbound 100th from Bridgeport, thats where he turned off to report it.

237 — I'll be out at Thrifco.

Radio: — Also I have information the suspect is possibly being followed by a full sized blue vehicle driven by a white male - I have no further description or direction of travel from that.

179 — Can I have the license number one more time please?

Radio: — King Robert Adam Union Sam 2, that on the red Volkswagon.

Radio: — 4 units on the armed robbery, the full sized blue vehicle that was following the red Volkswagon is the reportee at the reportee at the precinct.

? — How sure is he that its a Volkswagon?

Radio: — Is he real sure that its a Volkswagon?

? — He's not real sure, its a Rabbit type vehicle - what did the registration come back on?

Radio: — I don't know yet? Just a second - 83 Honda Civic

?	How about a Honda Civil? Sounds okay.
Radio:	Or the Honda right?
?	Yea, they look pretty similar.
?	My portable batteries are really low so I can't get out.
Radio:	The reportee referenced the red vehicle, he is not real sure on the volkswagon, advised it could have been a rabbit type vehicle.
?	Okay, the registration comes back a Honda Civic right?
Radio:	Or a Honda.
?	Where are you now White?
?	Just off 88th on _____.
?	We're at 92nd and Lawrence now.
40:	Are there some units floating around, I'd like somebody to check Ponders area and the area _____.
?	_____ Ponders.
Radio:	Several units, 155 will be checking Ponders.
?	What was the exact address on Lorraine?
Radio:	9004

?	_____ down Lorraine now?
?	Yea, I'm right at 90th now.
?	Were in the higher block - 90th.
Radio:	What's the plate again King Robert Adam Union Sam 2.
?	_____ that drive way.
?	Which driveway.
?	Just in front of you on the left, the corner one. Back behind you now.
126:	We are going to be on a quick check of the car.
Radio:	Received 126, what unit is with you?
126:	215.
126:	County.
Radio:	126 your not coming in at all.
40:	126 go ahead I'll relay.
?	Okay I'll be right there
179:	I'm heading there also.
Radio:	I take it the cars on Lorraine?
?	Affirm.

?	Okay, why don't you just maintain surveillance on - for right
126:	Yeah we have a perimeter around the house.
179:	Where do you want to meet at and I'll walk in too.
?	Just come off 88th and just park a little bit south on Lorraine.
179:	Received.
40:	_____ I'm in the area, would you look in the cross directions and try to come up with a phone number for this house.
126:	We are right at the intersection of 88th and Lorraine.
?	Okay, I'm just north of you, are you sitting on the house?
?	Affirm.
?	Okay, I am going to walk up on foot, 40 just pull over when you see my car.
Radio:	We have 2 phone numbers for the house.
?	Received.
40:	126 Are you in the front or the rear?
?	I'm going to the rear.

179: 40 I'm coming down Lorraine right now.

? _____ plan to cut out ot 88th and then come back in on 90th.

? Drive my car down 90th.

? Right.

126: 40 _____ computer _____ real active.

? Where do you want me to stop at Rich, right before 90th and Lorraine?

? _____ Lorraine.

? Back up and go all the way around South Tacoma Way and in.

? Did you want 179?

? 159 additional _____ if he didn't respond.

179: Did you copy that?

Radio: He wants 159 from the Precinct?

179: Tell him to come up 90th off of South Tacoma Way and they will flag him down.

Radio: 159 will be in route from the precinct, he doesn't have the witness anymore.

159: Can I give you some info on this witness?

40: _____

? Perimeter _____

THERE ARE TWO DEPUTIES TALKING BACK AND FORTH ON THEIR RADIOS BUT IS IS IMPOSSIBLE TO UNDERSTAND WAHT [SIC] THEY ARE SAYING

SIDE B OF TAPE

159: We need the victims description of the suspect again.

Radio: Channel 3 with a update of the victims description of the suspect.

237: Black male - 5-9 - slim to medium build - black afro short - baseball cap with a design on front - unknown - brown eyes and blue jeans.

159: What about a jacket or shirt?

? Blue windbreaker jacket.

237: Silver gun with pearl handle.

40: We are going to pull our vehicle out front of the residence and then we are going to have the county make a call to the residence and ask them to step outside.

? _____ driveway.

40: Yes we are going to block off the driveway.

40: 215 copy - yes.

40: To the County, would you 1021 the residence and advise them that we are investigating an armed robbery and ask them to step outside.

Radio: Hi, this is the dispatcher at the Pierce County Sheriff's Office. I have deputies who are investigating a robbery they are outside and they want you to come outside now.

Kraus: Me?

Radio: Yes.

Kraus: Who is this?

Radio: This is the Sheriff's Office.

Kraus: No

Radio: Is this Dale?

Kraus: Yes

Radio: Alright, the deputies are outside Dale.

Kraus: Outside my house?

Radio: Yes

Kraus: Front or back?

Radio: The front.

Kraus: Are you kidding me?

Radio: No, I'm not.

Kraus: Is this really the dispatchers office?

Radio: Yes it is.

Kraus: And they want me to come out?

Radio: Thats right.

Kraus: There's nobody outside my house?

Radio: Look out the window they are outside Dale, this isn't a joke, its not funny.

Kraus: There's nobody outside my house. There's nobody outside my house.

Radio: Yes they are.

Kraus: They are?

Radio: Is you address 9004 Lorraine?

Kraus: That's right

Radio: Okay, thats where they are.

Kraus: Well I don't seem them anywhere, I'm outside.

Radio: Your outside now

Kraus: No, I just looked out the window and there's nobody there. Nobody out in front or back.

Radio:	Put the phone down without hanging up, open the front door and walk outside.
Kraus:	Okay, just a second, let me walk out the back door. Oh yea they are here, okay. Where was the robbery at?
Radio:	Okay, they will let you know, go outside and meet them.
Kraus:	Okay.
?	I'll go to the front door and let you know.
?	There are two males and a female and another female.
?	It just doesn't look right, its secure here and we are satisfied its not them.

HONORABLE JACK E. TANNER

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DALE E. KRAUS and ROSETTA M. KRAUS, husband and wife; CINDY D. KRAUS, individually; and TODD W. MONTGOMERY, individually, Plaintiffs, v. COUNTY OF PIERCE, a political subdivision of the State of Washington; LLOYD BIRD and "JANE DOE" BIRD, husband and wife and the marital community of them composed, RICHARD RICE and "JANE DOE" RICE, husband and wife and the marital community of them composed; RICHARD SHADDUCK and "JANE DOE" SHADDUCK, husband and wife, and the marital community of them composed; KENNETH TUCKER and "JANE DOE" TUCKER, husband and wife, and the marital community of them composed; JAMES ANDREWS and "JANE	)	No. C84-870T AFFIDAVIT OF KENNETH TUCKER

Appendix "C"

DOE" ANDREWS, husband and wife, and the marital community of them composed; CERTAIN UNKNOWN MEMBERS OF THE PIERCE COUNTY SHERIFF'S OFFICE and their respective spouses, and the marital communities of them composed,

Defendants.

STATE OF WASHINGTON)
: ss.
COUNTY OF PIERCE)

KENNETH TUCKER, being first duly sworn, on oath deposes and states:

1. That I am Kenneth Tucker, and have personal knowledge of the facts herein set forth.

2. That I am employed as a Pierce County Deputy Sheriff and was so employed and on duty on September 29, 1984. I have been a Deputy Sheriff with the Pierce County Sheriff's Office for six years.

At 7:52 in the evening on September 29, 1984, I was contacted at the west precinct in Lakewood,

Washington by a witness to an armed robbery named Robert Paul Kay. Mr. Kay told me he had just witnesses an armed robbery at the First Interstate Bank cash machine in the Villa Plaza mall. Kay told me that at approximately 7:50 that evening, he drove up to the cash machine and saw a white male and a black male who appeared to be talking. Mr. Kay told me that when he got out of his car, the black male ran in a northeast direction toward the Villa Thriftco parking lot. He told me that the white male then told him that he had just been robbed. Mr. Kay told me that he then drove to the Thriftco lot where he had last seen the black male. Mr. Kay told me that he then saw a red hatchback-type car leaving the lot. Mr. Kay told me that he followed it as it rolled through the stop signs at Bristol where it intersects the parking lot and where Bristol intersects 100th Street Southwest, and that the car then accelerated rapidly eastbound on 100th Street. Kay

said that he had immediately turned north on Bridgeport and drove to the precinct. He told me that the license plate on the car was Washington vanity plate "KRAUS 2."

I relayed this information to the Pierce County Dispatcher. I was contacted a short time later by Sergeant Richard Rice. He told me that the "KRAUS 2" license plate had been traced to an address of 9004 Lorraine Avenue and that he was at that residence with other deputies. Sergeant Rice then instructed me to come to that address. When I arrived, I reviewed the information given to me by Mr. Kay with Sergeant Rice, and we then discussed what options were open to us at that time. We decided that the least intrusive and most effective course of action, given the exigency of the situation, would be to contact the Pierce County Dispatcher and ask them to call into the house and inform the occupants that we were outside the house investigating an armed robbery and

to instruct them to please come outside. Other deputies were arranging a perimeter around the house leaving only Sergeant Rice and myself down at the foot of the driveway next to a Pierce County squad car. I was holding a shotgun as was Sergeant Rice. We did not have any lights on and at that time I was not using a flashlight.

Shortly after the dispatcher made the call to the residence, two subjects appeared out of the house. They walked towards us at a rapid rate and one of them appeared to be carrying something. At that time, I turned on my flashlight, which was the first time any light had been illuminated and was the only light that was illuminated. As I was shining the flashlight on the two subjects, I told them to stop, turn around, put their hands over their heads, and kneel down. At this time, we were able to ascertain that the two subjects were white and that the object in one of their hands was a cordless telephone. We then made the deter-

mination that neither subject fit the description of the armed robber who was described as being black, and told the two subjects to stand up. These two subjects were later identified as being Dale Kraus and Todd Montgomery.

Sergeant Rice then explained the situation, that their vehicle had been seen leaving the scene of an armed robbery at a rapid rate running two stop signs. Another deputy at that time then obtained the names and addresses of the parties involved, and we left the scene.

From the time I received the report from Mr. Kay until the time I arrived at the Kraus residence it was approximately 20 minutes. The period of time from when the dispatcher called into the Kraus residence and when we ascertained that Mr. Kraus and Mr. Montgomery did not fit the suspect description and allowed them to stand up took less than five minutes.

During the period of time when Mr. Kraus and

Mr. Montgomery were coming down the driveway and when they were standing on their knees, Sergeant Rice and myself did have our shotguns drawn and aimed at Mr. Kraus and Mr. Montgomery from a distance of approximately 20 feet.

Further your affiant sayeth naught.

_____

KENNETH TUCKER

SUBSCRIBED AND SWORN to before me this 14th day of August, 1985.

_____

Notary Public, in and for the State of Washington, residing at Tacoma.

LAW OFFICES OF MONTE E. HESTER
Attorneys FOR Plaintiffs
1008 South Yakima Avenue
P.O. Box 5366
Tacoma, Washington 98405
(206)272-2157

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DALE E. KRAUS and ROSETTA M. KRAUS, husband and wife; CINDY D. KRAUS, individually; and TODD MONTGOMERY, individually, Plaintiffs, v. COUNTY OF PIERCE, et al, et ux, Defendants.	No. C84-807T AFFIDAVIT OF DALE E. KRAUS

STATE OF WASHINGTON)
)ss.
County of Pierce)

DALE E. KRAUS, being first duly sworn on oath, deposes and says as follows:

That I am one of the Plaintiffs in the above-

referenced matter, have personal knowledge of the facts set forth in this affidavit, and make this affidavit in opposition to Defendants' Motion for Summary Judgment.

On Saturday, September 29, 1984, my wife, Rosetta Kraus, and I spent the day at Mt. Rainier and arrived home around 8:00 p.m. Shortly thereafter, my daughter, Cindy, and her boyfriend, Todd Montgomery, arrived home from Thriftco with a rented movie. The four of us began watching the movie in our living room. There were curtains that were wide open, and anyone could see in.

After we had been watching the movie for a few minutes, the phone rang. We have a cordless phone. I answered the phone and a lady on the other end said that she was calling from the Pierce County Sheriff's Office. She said that Sheriff's officers were outside and wanted to talk to me. I thought she was joking, but she insisted she was not. She told me to look out the front

window, and I did, but could see nothing. She insisted that the Sheriff's officers were outside. I then went to the back door, walked out the door, and did see a police car at the end of my driveway. As I stepped outside, immediately spotlights were shined on me and I saw at least two shotguns pointed at me. I had the cordless phone in my hand, and was ordered to put it down very slowly. I was then ordered to get my hands in the air. I was scared to death. I was ordered to walk towards the officers. The officers repeatedly told me to get my hands higher, and to walk slower. After I had taken a few steps, I looked to my right and Todd Montgomery was also walking towards the officers with his hands in the air. I asked the officers what was happening, and they just ordered me to get my hands higher. When Todd came into view, there was an officer behind him with a gun pointed at him.

When Todd and I reached the police cars, the

officers ordered both of us to turn around, continuing to point the guns at us. They then ordered us to kneel down, with the guns still pointed at us. We were then ordered to get our faces to the ground. I was certain that I was under arrest.

Finally, after we had been on the ground for some time, we were told that we did not fit the description of a suspected armed robber, and that we could get up. Some of the officers then came inside the house and looked around. While inside, I was asked my name, address, telephone number and place of employment and possibly other questions.

No one from Pierce County or its Sheriff's office ever explained whey this happened to us, nor did anyone ever apologize or contact us in any manner.

As we will testify at trial, this incident had a tremendous emotional impact on my family.

FURTHER THIS AFFIANT SAYETH NAUGHT.

DALE E. KRAUS

SUBSCRIBED and SWORN to before me this 9th day of September, 1985.

NOTARY PUBLIC in and for the State of Washington, residing at Tacoma.

LAW OFFICES OF MONTE E. HESTER
Attorneys FOR Plaintiffs
1008 South Yakima Avenue
P.O. Box 5366
Tacoma, Washington 98405
(206)272-2157

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DALE E. KRAUS and ROSETTA M. KRAUS, husband and wife; CINDY D. KRAUS, individually; and TODD MONTGOMERY, individually, Plaintiffs, v. COUNTY OF PIERCE, et al, et ux, Defendants.	No. C84-807T AFFIDAVIT OF TODD MONTGOMERY

STATE OF WASHINGTON)
)ss.
County of Pierce)

DALE E. KRAUS, being first duly sworn on oath, deposes and says as follows:

That I am one of the Plaintiffs in the above-

referenced matter, have personal knowledge of the facts set forth in this affidavit, and make this affidavit in opposition to Defendants' Motion for Summary Judgment.

On Saturday, September 29, 1984, Cindy Kraus and I were at the Thriftco store in Lakewood renting a movie. After I rented the movie, I came back out to the car we were using, a red Honda, owned by Cindy's parents. I left the parking lot driving slowly for a number of reasons. First, there were speed bumps in the lot. Second, I was driving a car not owned by me. Third, Cindy does not like for me to drive fast. Fourth, the parking lot was crowded and there were a lot of pedestrians present. I took an access road out of the parking lot, and then turned right on 100th Street to head for the Kraus residence. I did not run a stop sign or stop light in the process.

When we arrived at the Kraus residence, Cindy's parents, and Cindy and I, began watching a

movie. Shortly thereafter, the phone rang, and Dale Kraus answered it. I heard him ask if the person was joking, watched him look out the front window, then heard him say that he saw no one. I then opened the front door, looked out, and then walked outside. After I took a few steps, I was blinded by a bright light. I attempted to go back into the house, but was told to freeze and put my hands in the air. I heard Cindy ask me what was happening. I told her to stay inside and to get Dale.

After I was ordered to walk, I took a few steps. I saw two or three police cars facing me, with their spot lights on me, and with a few officers kneeling with guns pointed at me. I was certain that I was under arrest. I was told to freeze. I then saw Dale Kraus, who had a cordless phone in his hand. He was told to put it down very slowly, which he did, and then was ordered to get his hands back in the air. Dale and I walked

toward each other, and then toward the officers. We were then told to turn around, kneel down on the ground with our hands in the air and our faces down. At some point I heard Dale ask the officers what was going on, but they would not say.

After we got up, we went into the house and were asked our names, telephone numbers and places of employment. No one ever explained what had happened or apologized.

This incident has had a big emotional impact on me and the Kraus family. We spend quit a bit of time together.

FURTHER THIS AFFIANT SAYETH NAUGHT.

_____
TODD MONTGOMERY

SUBSCRIBED and SWORN to before me this 9th day of September, 1985.

_____
NOTARY PUBLIC in and for the State of Washington, residing at Tacoma.

HONORABLE JACK E. TANNER

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DALE E. KRAUS and ROSETTA M. KRAUS, husband and wife; CINDY D. KRAUS, individually; and TODD W. MONTGOMERY, individually,	)	
Plaintiffs,	)	
v.	)	No. C84-870T
COUNTY OF PIERCE, a political subdivision of the State of Washington; LLOYD BIRD and "JANE DOE" BIRD, husband and wife and the marital community of them composed, RICHARD RICE and "JANE DOE" RICE, husband and wife and the marital community of them composed; RICHARD SHADDUCK and "JANE DOE" SHADDUCK, husband and wife, and the marital community of them composed; KENNETH TUCKER and "JANE DOE" TUCKER, husband and wife, and the marital community of them composed; JAMES ANDREWS and "JANE	)	AFFIDAVIT OF RICHARD RICE

Appendix "C"

DOE" ANDREWS, husband)
and wife, and the marital)
community of them com-)
posed; CERTAIN UNKNOWN)
MEMBERS OF THE PIERCE)
COUNTY SHERIFF'S OFFICE)
and their respective)
spouses, and the marital)
communities of them)
composed,)
)
Defendants.)
)

STATE OF WASHINGTON)
:ss
County of Pierce)

RICHARD RICE, being first duly cautioned and sworn, states as follows:

That I have personal knowledge of the facts herein set forth. That I am employed as a sergeant with the Pierce County Sheriff's Office and was so employed and on duty on September 29, 1984. That I have been employed by the Pierce County Sheriff's Office since August of 1977. Previous to that I had worked for three years with the Washington D.C. Metropolitan Police Department.

Sometime just before 8:00 o'clock on the

evening of September 29, 1984, I was monitoring the sheriff's radio dispatch and heard a report of an armed robbery at the First Interstate bank cash machine in the Villa Plaza mall. The sheriff's radio also indicated that there was a possible suspect vehicle that was seen leaving the parking lot adjacent to the bank cash machine at a high rate of speed running a stop sign. It was described as being a small red vehicle with two occupants bearing the license plate KRAUS 2.

An address was obtained for the registration for the suspect vehicle bearing the KRAUS 2 license plate and was traced to a residence at 9004 Lorraine Avenue South. Two other units responded immediately to that address and observed the suspect vehicle parked in the driveway. I then proceeded to that location and arrived at approximately 8:06 p.m. I was the shift supervisor for that evening and was therefore the responsible command officer and took over direction of police

activities. My first action was to contact the sheriff's dispatcher and have them obtain a phone number for the residence. Deputies Shadduck and Bird had already arrived on the scene. They were positioned on the south side of the residence. I took up a position on the north side of the residence at the end of the suspect residence driveway. Deputy Andrews then also arrived and I directed him to take up a perimeter position near the suspect residence.

I then requested that Deputy Tucker, who had taken the initial report from the witness who identified the suspect vehicle, to come to the suspect residence. When Deputy Tucker arrived I asked him to give me all of the available information on the situation and the suspect vehicle. Deputy Tucker informed me that he had been contacted approximately 7:52 that evening by a Robert Paul Kay at the West Precinct in Lakewood, Washington. He further related that Mr. Kay had said

that he just witnessed an armed robbery at the First Interstate bank cash machine in the Villa Plaza mall; that at approximately 7:50 that evening, Kay had driven up to the cash machine and saw a white male and a black male who appeared to be talking; that when he got out of the car, the black male ran in a northeast direction toward the Villa Thriftco parking lot; that the white male told him that he had just been robbed; that Mr. Kay then immediately drove to the Thriftco lot where he had last seen the black male fleeing and observed a red hatchback type car leaving the lot; that the vehicle rolled through the stop signs at Bristol where it intersects the parking lot and then ran through a second stop sign where Bristol intersects 100th Street S.W.; and that the car accelerated rapidly eastbound on 100th Street. Mr. Kay had related that he was able to observe the license plate on the car as being vanity plate "KRAUS 2." Deputy Tucker also informed me that

Mr. Kay had said that he saw two persons in the vehicle but could only see the silhouettes and could not ascertain whether ot not the people were black or white or male or female.

Based on the facts that: (1) there was a witness who observed an armed robbery, and a suspect fleeing on foot into a parking lot; (2) who momentarily thereafter saw a small red vehicle rapidly leaving the parking lot running two stop signs, and accelerating rapidly away from the scene of the robbery; (3) that he chased this vehicle from the scene to 100th and Bridgeport; (4) was able to observe that the license plate was KRAUS 2, at which point the witness drove to our West Precinct located in Lakewood, Washington, and reported what he had seen; and (5) given that this vehicle was traced to the suspect residence and that the vehicle was found in the driveway of the suspect residence, I made a determination that there was probable cause to believe that the

suspect may be located in the residence where the suspect vehicle was parked.

At 8:31 p.m. with all of the officers in position, I requested the dispatcher to telephone the residence to advise the occupants that we were outside the house investigating an armed robbery and to instruct them to please come outside. I was positioned with Deputy Ken Tucker at the foot of the driveway of the Kraus residence. Deputy Tucker and I were standing outside the vehicle and were both armed with shotguns. At that time we did not have any lights trained on the house and it was decided that Deputy Tucker would direct the suspect's actions, using voice commands. Shortly after the dispatcher made the call to the residence two subjects appeared out of the house. They walked towards us at a rapid rate and one of them appeared to be carrying something. Deputy Tucker then directed them to stop and turn around and put their hands over their heads and kneel

down. He was using only his voice, without amplification or a bull horn. At this time we were able to ascertain that the two subjects were white and that the object in one of their hands was a cordless telephone. After we had established that neither subject was armed and that they did not fit the description of the suspect who was reported to have been black, I left my position from behind the vehicle and stepped towards Mr. Kraus. I then told him that he could stand up. I further explained to him that we had been investigating an armed robbery and that the red vehicle bearing the license KRAUS 2 had been seen leaving the scene of the robbery at a high rate of speed. I asked him who was in the residence and he replied only his wife and daughter. Based on his demeanor, I felt reasonably assured that the armed robbery suspect was not in the residence. I then explained the whole situation to Mr. Kraus and had Deputy Bird take down the names and addresses of the people

involved.

All my actions throughout this incident were performed in good faith and were in conformance with my training and what is considered to be accepted police procedure. The total period of time from when the dispatcher called into the Kraus residence and when we ascertained that Mr. Kraus and Mr. Montgomery did not fit the suspect description and allowed them to stand up, was less than five (5) minutes.

Further your affiant sayeth naught.

_____
RICHARD RICE

SUBSCRIBED and SWORN to before me this 12th day of September, 1985.

_____
NOTARY PUBLIC in and for
the State of Washington,
Residing at Tacoma.

HONORABLE JACK E. TANNER

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DALE E. KRAUS and ROSETTA M. KRAUS, husband and wife; CINDY D. KRAUS, individually; and TODD W. MONTGOMERY, individually, Plaintiffs, v. COUNTY OF PIERCE, a political subdivision of the State of Washington; LLOYD BIRD and "JANE DOE" BIRD, husband and wife and the marital community of them composed, RICHARD RICE and "JANE DOE" RICE, husband and wife and the marital community of them composed; RICHARD SHADDUCK and "JANE DOE" SHADDUCK, husband and wife, and the marital community of them composed; KENNETH TUCKER and "JANE DOE" TUCKER, husband and wife, and the marital community of them composed; JAMES ANDREWS and "JANE	No. C84-870T AFFIDAVIT OF RICHARD SHADDUCK

Appendix "C"

DOE" ANDREWS, husband and wife, and the marital community of them composed; CERTAIN UNKNOWN MEMBERS OF THE PIERCE COUNTY SHERIFF'S OFFICE and their respective spouses, and the marital communities of them composed,

Defendants.

STATE OF WASHINGTON)
) ss:
COUNTY OF PIERCE)

RICHARD RICE, being first duly sworn on oath deposes and says:

I am Richard Shadduck, and have personal knowledge of the facts herein set forth. That I am a Deputy Sheriff for the Pierce County Sheriff's Office and was so employed on September 29, 1984. That I have twelve (12) years experience as a Pierce County Deputy Sheriff and I am a certified field training officer.

On September 29, 1984, I was on routine patrol in a Pierce County Sheriff's Office squad

car. I received a report of an armed robbery of the Villa Plaza First Interstate Bank Cash Machine. I responded to the call and received the information that there was a suspect vehicle with the license plate "Kraus 2." The dispatcher gave me the address to which the license plate was traced which was 9004 Lorraine. I then proceeded to drive to that residence. As I came upon the residence, I spotted the suspect vehicle in the driveway. I then walked up to the car and observed that it matched the description given by the dispatcher of being a red hatchback vehicle bearing the license plate "Kraus 2." I felt the hood of the car and observed it still being warm. I went back to my patrol vehicle and reported that the suspect vehicle was at the 9004 Lorraine address parked in the driveway. I then moved my car further down on Lorraine Street and my partner and myself then set up surveillance of the house at 9004 Lorraine until other units responded.

Other deputies soon arrived and we set up a perimeter surrounding the house. We also called into the Pierce County dispatcher and asked them to look up the phone number of the house. The dispatcher got a number and we asked the dispatcher to call the residence and advise the occupants that we were investigating an armed robbery and to ask them to step outside.

I positioned myself toward the front side of the house on the opposite side of the house from where the driveway was located. After waiting a short period of time, I heard one of the other deputies say that it "wasn't them."

I then walked around to the back side of the house and saw the deputies talking to Dale Kraus and Todd Montgomery. Todd Montgomery and Dale Kraus were both standing and appeared to be calm and were talking with the other deputies. After having been apprised that they were not connected

with the suspect in the robbery, I left.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

_____
Richard Shadduck

Subscribed and sworn to before me this 14th day of August, 1985.

_____
Notary Public in and for the State of Washington, residing at Tacoma.

CONSTITUTIONAL PROVISIONS AND STATUES INVOLVED

A. U.S. Const. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

B. 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Supreme Court, U.S.
FILED
FEB 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-1222

In The
Supreme Court of the United States
October Term, 1986

DALE E. KRAUS, ET UX., ET AL.,
Respondents/Appellees,

vs.

COUNTY OF PIERCE, ET AL.,
Petitioners/Appellants.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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18 pp

QUESTIONS PRESENTED

1. Where a Motion for Summary Judgment on the grounds that police officers have qualified immunity from suit is denied on the basis that there are genuine issues of material fact as to whether the Plaintiffs, as claimed, were arrested without probable cause, is the order denying the Motion for Summary Judgment an appealable final decision?

2. On September 29, 1984, was the law clearly established that police officers cannot arrest individuals without probable cause?

3. Where individuals are ordered by a police dispatcher to leave a home, and when after exiting the home they are surrounded by at least five police officers, some of whom have weapons drawn, and are ordered to kneel on the ground at gunpoint, have the individuals been arrested?

4. Where a robbery by a black male occurs near a crowded parking lot, and a car is seen leaving the parking lot in a reportedly rapid manner, but the individuals inside the car cannot be identified by sex or race, and there are no other links between the owner of the car and the crime scene, is there probable cause to arrest the owner of the car for the commission of the robbery?

5. Where a governmental defendant in a civil rights action moves for summary judgment, prior to the taking of discovery depositions, on the basis that there was no policy or practice of unreasonable searches or seizures, and the motion is denied, is the order denying the Motion for Summary Judgment an appealable final decision?

TABLE OF CONTENTS

Page

I. STATEMENT OF THE CASE 1

II. REASONS FOR DENYING PETITION 4

A. The Order Denying The Motion For Summary Judgment On The Grounds That The Sheriff's Deputies Have Qualified Immunity From Suit In This Matter Is Not An Appealable Final Decision. 4

B. At The Time Of The Incident Which Is The Subject Of This Matter, The Law Was Clearly Established That Police Officers Cannot Make An Arrest Without Probable Cause. 5

C. Dale Kraus And Todd Montgomery Were Arrested When They Were Ordered To Leave The Home, Surrounded By Deputies Shining Spotlights On Them And Pointing Shotguns At Them, And Ordered To Kneel On The Ground At Gunpoint. 6

D. The Information Upon Which The Deputies Acted In Making The Arrests Did Not Amount To Probable Cause To Believe That The Occupants Of The House Had Committed A Robbery. 9

E. The Order Denying Pierce County's Motion For Summary Judgment Is Not An Appealable Final Decision, And There Are Genuine Issues Of Material Fact As To its Liability Which Require Discovery. 11

III. CONCLUSION 13

TABLE OF AUTHORITIES

Page

Cases

Beck v. Ohio, 379 U.S. 89, 91, 13 L.Ed.2d 142, 85 S.Ct. 223 (1964) 5

Brown v. Texas, 443 U.S. 47, 50, 61 L.Ed.2d 357, 99 S.Ct. 2637 (1978) 6

Florida v. Royer, 460 U.S. 491, 502, 75 L.Ed.2d 229, 103 S.Ct. 1319 (1983) 6, 7, 8

Gilker v. Baker, 576 F.2d 245, 247 (9th Cir. 1978) 4

Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L.Ed. 2d 396, 102 S.Ct. 2727 (1982) 5

In re United So. Cos., 410 F.2d 377 (5th Cir. 1969) 4

Jones v. St. Paul Fire and Marine Ins. Co., 108 F.2d 123 (5th Cir. 1939) 4

Kraus v. Pierce County, 793 F.2d 1105, 1109 (9th Cir. 1986) 9, 12

Mitchell v. Forsyth, 53 U.S.L.W. 4798, 4803, 105 S.Ct. 86, 2806 L.Ed.2d 411 (1985) 4, 5, 12

Owen v. City of Independence, 445 U.S. 622, 63 L.Ed.2d 673, 100 S.Ct. 1398 (1980) 12

Payton v. New York, 445 U.S. 573, 589, 63 L.Ed. 2d 639, 100 S.Ct. 1371 (1980) 9

State v. Donohoe, 39 Wn. App. 778, 695 P.2d 150 (1985) 10

State v. Gluck, 83 Wn.2d 424, 518 P.2d 703 (1974) 10

State v. Hewey, 144 Vt. 636, 471 A.2d 236 (1983) 9

State v. Jackson, 296 Ore. 430, 677 P.2d 21 (1984) 9

State v. Taylor, 716 F.2d 701 (9th Cir. 1983) 8

State v. Thompson, 558 F.2d 522 (9th Cir. 1977) 8

TABLE OF AUTHORITIES—Continued

Page

State v. Wakeley, 29 Wn.App. 238, 628 P.2d 835 (1981) 8

State v. Young, 39 Wn.2d 910, 239 P.2d 858 (1952) 10

Terry v. Ohio, 392 U.S. 1, 16, 20 L.Ed.2d 889, 88 S.Ct. 1968 (1968) 6, 7, 8

United States v. Hensley, 469 U.S. 221, 83 L.Ed.2d 604, 105 S.Ct. 675 (1985) 8

United States v. Mendenhall, 446 U.S. 544, 554, 64 L.Ed.2d 497, 100 S.Ct. 1870 (1979) 6

United States v. Montoya De Hernandez, 473 U.S. —, 87 L.Ed.2d 391, 105 S.Ct. 3304 (1985) 8

United States v. Sharpe, 470 U.S. 675, 84 L.Ed.2d 605, 105 S.Ct. 1568 (1985) 8

Wong Sun v. United States, 371 U.S. 471, 479, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963) 5

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. IV 6, 7, 9

FEDERAL RULES OF CIVIL PROCEDURE

Fed.R.Civ.P. 56(f) 12

I. STATEMENT OF THE CASE

On September 29, 1984, at approximately 7:50 p.m., a white male was robbed by a black male in front of a First Interstate Bank cash machine in the Villa Plaza Shopping Mall in Pierce County, Washington. App. "C", pp. 1-2. A witness, Robert Paul Kay, Jr., had observed the victim and the suspect conversing. As the suspect left the victim, Mr. Kay approached the cash machine and the victim, and was informed by the victim that he had just been robbed. Mr. Kay got back into his automobile and attempted to follow the suspect, but lost him in the nearby Thriftco parking lot. App. "C", pp. 3-4.

Subsequent to losing the suspect in the parking lot, Mr. Kay apparently observed a red vehicle leaving the parking lot in what he felt was a rapid manner. He noticed that the vehicle "rolled through the stop signs" where the parking lot enters the street. He followed the vehicle down 100th Street, and then proceeded to the Pierce County Sheriff's Office, Lakewood Precinct. At the precinct, he reported that he had witnessed a black man robbing a white victim and that he had followed the suspect for a time, but had lost him. He reported that he had seen a red vehicle with Washington plates "KRAUS 2" leaving the parking lot in what he felt was a rapid manner. App. "C", pp. 4-5. He could not identify the sex nor the race of either of the two occupants of the vehicle. App. "C", p. 13.

The Sheriff's Office used the information from Mr. Kay to determine the address of the owner of the car and made no further inquiries of Mr. Kay. The officer who took the information from Mr. Kay did not ask him wheth-

er any occupant of the car looked like the robber, or why he believed the car was connected with the robbery. App. "C", pp. 4-5, 24-26. Several deputies were immediately dispatched to the address of the car's owner, Dale Kraus, and the deputies set up a perimeter surrounding the house. App. "C", pp. 50-51.

Todd Montgomery and Cindy Kraus were at the Thriftco store renting a movie on the evening of September 29, 1984. The parking lot was very crowded. They left the parking lot in a red Honda owned by Dale Kraus, Cindy's father, and proceeded home down 100th Street. There was nothing peculiar about the way in which Mr. Montgomery was operating the car. App. "C", p. 36.

Dale Kraus and Rosetta Kraus, husband and wife, own and reside in a home located at 9004 Lorraine Avenue South, Tacoma, Washington, with their daughter, Cindy. None of the four individuals are black. Shortly after Mr. Montgomery and Cindy Kraus arrived at the Kraus residence with the movie, the four individuals began watching the movie in the living room. Window curtains were wide open, and one could easily see inside and observe that the four individuals are white and were casually watching television. App. "C", p. 31.

At some point after the four individuals began watching the movie, the Pierce County Sheriff's Deputies surrounded the Kraus residence. Shortly thereafter, Mr. Kraus was contacted, by telephone, by a dispatcher from the Pierce County Sheriff's Department, and was ordered to come out of the house in order to be interrogated by sheriff's officers regarding a robbery. Mr. Kraus looked outside but was unable to see any sheriff's officers. He

then stepped outside the house. Spotlights were immediately shined into his eyes, and shotguns pointed at him. Mr. Kraus was ordered to put his hands up, and then repeatedly ordered to put them higher. He was ordered to walk towards the officers, who continued to shine the spotlights on him and to point shotguns at him. His requests for information as to what was happening were ignored. App. "C", pp. 31-32.

Mr. Montgomery also came out of the house. He too was confronted by bright lights, and was told to freeze, put his hands in the air, and walk forward while shotguns were pointed at him. App. "C", p. 37. When Mr. Montgomery reached Mr. Kraus, both were ordered to walk toward the officers, then ordered to turn around and kneel down on the ground while holding their hands over their heads. The officers continued to shine lights on both individuals, and to point shotguns at them. After being forced to remain on the ground for a period of time, the two individuals were told that the officers were investigating a robbery, but neither fit the description of the robber, and that they could get up. App. "C", pp. 32-33.

After Mr. Kraus and Mr. Montgomery were permitted to get up off the ground, some of the officers entered the house and searched a portion of the premises. App. "C", p. 33. Each of the individuals were questioned as to their names, addresses, phone numbers and places of employment. The officers then left. App. "C", p. 38.

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II. REASONS FOR DENYING PETITION

A. The Order Denying The Motion For Summary Judgment On The Grounds That The Sheriff's Deputies Have Qualified Immunity From Suit In This Matter Is Not An Appealable Final Decision.

It is clear that, ordinarily, the denial of a motion for summary judgment does not dispose of the case and is not final. *Jones v. St. Paul Fire and Marine Ins. Co.*, 108 F.2d 123 (5th Cir. 1939); *In re United So. Cos.*, 410 F.2d 377 (5th Cir. 1969). Petitioners have relied on *Mitchell v. Forsyth*, 53 U.S.L.W. 4798, 4803, 105 S.Ct. 2806, 86 L. Ed.2d 411 (1985), as authority for the proposition that denial of the motion for summary judgment in this matter was a final decision. However, in *Mitchell*, at 4803, the Court held that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable final decision.

The Order denying Defendant's Motion for Summary Judgment makes clear that the District Court found genuine issues of material fact which preclude summary judgment. App. "A", pp. 20-21.

It is submitted that, in a civil case, where the issue is whether a warrantless arrest was supported by probable cause, the question of existence of probable cause is for the jury. See *Gilker v. Baker*, 576 F.2d 245, 247 (9th Cir. 1978). To allow an appeal in each instance where police officers are alleged to have made a warrantless arrest without probable cause, and a summary judgment motion claiming qualified immunity on behalf of the police officers is denied, would serve only to clog the appellate

courts and delay trials, and would not be consistent with the intent of this court in *Mitchell v. Forsyth, supra.*

B. At The Time Of The Incident Which Is The Subject Of This Matter, The Law Was Clearly Established That Police Officers Cannot Make An Arrest Without Probable Cause.

Probable cause for an arrest exists where the arresting officer has knowledge of facts and circumstances "sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Beck v. Ohio,* 379 U.S. 89, 91, 13 L.Ed.2d 142, 85 S.Ct. 223 (1964). An arrest is unlawful if made without probable cause. *Wong Sun v. United States,* 371 U.S. 471, 479, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963).

According to the test for qualified immunity established by this Court, the deputies in this case are immune from suit if "their conduct [did] not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982). Any reasonable police officer would have known, at the time of this incident, that it was clearly established that an arrest without probable cause violates the constitutional rights of the person arrested. There is no split of authority on the issue of qualified immunity as it applies to this case, as there is no authority from any jurisdiction which would authorize the actions taken by the deputies.

C. Dale Kraus And Todd Montgomery Were Arrested When They Were Ordered To Leave The Home, Surrounded By Deputies Shining Spotlights On Them And Pointing Shotguns At Them, And Ordered To Kneel On The Ground At Gunpoint.

A person has been arrested, or "seized" pursuant to the Fourth Amendent, when "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall,* 446 U.S. 544, 554, 64 L.Ed.2d 497, 100 S.Ct. 1870 (1979). A seizure occurs when "a police officer accosts an individual and restains his freedom to walk away." *Brown v. Texas,* 443 U.S. 47, 50, 61 L.Ed. 2d 357, 99 S.Ct. 2637 (1978), citing *Terry v. Ohio,* 392 U.S. 1, 16, 20 L.Ed.2d 889, 88 S.Ct. 1968 (1968). Circumstances which amount to "a show of official authority such that 'a reasonable person would have believed he was not free to leave' " constitutes a seizure. *Florida v. Royer,* 460 U.S. 491, 502, 75 L.Ed.2d 229, 103 S.Ct. 1319 (1983), citing *Mendenhall, supra.*

Petitioners argue that the conduct of the deputies amounted to no more than an investigatory stop, as authorized initially in *Terry v. Ohio, supra.* In *Terry,* this Court approved a brief, on-the-spot, stop and frisk for weapons without probable cause since such action is much less severe than the intrusiveness of a traditional arrest. This conduct was approved in instances where a police officer *observes* unusual conduct, and believes that those he is dealing with may be armed and dangerous. In such instances, he may "conduct a carefully limited search of the outer clothing" in order to discover weapons. *Id.,* at 30. Nothing in *Terry,* nor any other case,

in any jurisdiction, authorizes police officers to order individuals out of their homes at gunpoint, and it is chilling to think that *Terry* would authorize such conduct.

In addition, *Terry* stops, while they do not require probable cause, do require a "reasonable suspicion" that the person stopped is engaged in criminal activity, and the means employed to effect the stop must be the least intrusive available. *Florida v. Royer, supra,* at 499-500. Again, the deputies had nothing to link the car observed by Mr. Kay nor its occupants to the crime scene, so they did not even have the required "reasonable suspicion," and ordering Mr. Kraus and Mr. Montgomery out of the house cannot be characterized as a limited intrusion. Rather, it was a blatant violation of the Fourth Amendment right of persons to be secure in their houses, against unreasonable seizures.

Petitioners argue that the Ninth Circuit disregarded decisional law from the State of Washington in making its determination that Mr. Kraus and Mr. Montgomery were arrested without probable cause, and argue that this is improper because police officers are only familiar with decisions by the United States Supreme Court and the local state appellate courts. Interestingly, Petitioners nonetheless rely on decisions from the Fifth, Sixth, Eighth, Ninth and Tenth Circuits, United States District Courts from California and North Carolina, and the Supreme Courts of Oregon and Vermont to support their position.

Significantly, each case cited by Petitioners in support of their position that the conduct of the deputies amounted only to a *Terry* stop involved either an on-the-spot stop of individuals on foot in a public place (see

Terry v. Ohio, supra; Florida v. Royer, supra; United States v. Montoya De Hernandez, 473 U.S. —, 87 L.Ed.2d 391, 105 S.Ct. 3304 (1985) (border search at airport of suspected drug smuggler not subject to probable cause or reasonable suspicion requirements)), or a vehicle stop following which the occupants of the vehicle were detained. In *United States v. Hensley,* 469 U.S. 221, 83 L. Ed.2d 604, 105 S.Ct. 675 (1985), the driver of a vehicle was stopped based on a description of the *driver,* not the vehicle, identifying him as an armed robbery suspect. In *United States v. Sharpe,* 470 U.S. 676, 84 L.Ed.2d 605, 105 S.Ct. 1568 (1985), a driver of a vehicle suspected to be transporting marijuana was ordered to stop and refused to stop, following which he was pursued, eventually stopped, and detained. Similar facts gave rise to the holding in *State v. Thompson,* 558 F.2d 522 (9th Cir. 1977).

In *State v. Taylor,* 716 F.2d 701 (9th Cir. 1983), DEA agents obtained a warrant to search the home of a suspected drug trafficker, and upon arrival at the home, the suspect attempted to flee in an automobile. The officers who confronted the suspect after they stopped his automobile had specific knowledge that that individual was likely armed and dangerous. The Court ruled that the armed approach, the handcuffing, and the arrest of the individual whose home the officers had a warrant to search and who had fled the home, was reasonable. *State v. Wakely,* 29 Wn. App. 238, 628 P.2d 835 (1981), the only authority from the State of Washington relied on by Petitioners to support their claim that no arrest was made, involved the stopping and detention of a suspect in a shooting incident, based on a description of *both* the suspect and the vehicle.

Finally, *State v. Hewey*, 144 Vt. 636, 471 A.2d 236 (1983), involved a routine license check of the driver of a vehicle, and *State v. Jackson*, 296 Ore. 430, 677 P.2d 21 (1984), concerned a plain view search following a stop for a traffic violation.

In *Payton v. New York*, 445 U.S. 573, 589, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980), this Court made clear that nowhere is the Fourth Amendment zone of privacy "more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: 'The right of the people to be secure in their . . . houses . . . shall not be violated.' " This incident did not occur on a city street; rather, a house was surrounded, and individuals ordered out of the house. The officers were not detaining individuals as the result of a valid stop in order to search for weapons. They were conducting an investigation, using unreasonable and unlawful means.

D. The Information Upon Which The Deputies Acted In Making The Arrests Did Not Amount To Probable Cause To Believe That The Occupants Of The House Had Committed A Robbery.

Petitioners cite various decisions, again, from various jurisdictions throughout the country, in support of their proposition that the deputies did have probable cause to arrest Mr. Kraus and Mr. Montgomery. However, as noted by the Ninth Circuit, the cases relied upon by the Petitioners contain a link between a vehicle and its occupants to a crime or its scene, a link which is absent in this case. *Kraus v. Pierce County*, 793 F.2d 1105, 1109 (9th Cir. 1986).

Petitioners fail to fully state the facts in certain cases cited. In *State v. Gluck,* 83 Wn.2d 424, 518 P.2d 703 (1974), two police officers noticed a vehicle parked in front of a tavern, in an isolated part of a block, between 4:00 and 5:00 a.m. The car pulled away when the occupants noticed a police car. The suspect car was then pulled over, and the occupants observed and questioned. Later, on the basis of information provided by the first officers, two other officers, possessing information that the tavern had been forcibly entered, stopped and detained the occupants, and the first officers were called to the location of the stop, and the occupants were then arrested. Thus, the probable cause to arrest was based on the observations of the *suspects,* not just the vehicle, and information linking the suspects to the crime.

In *State v. Young,* 39 Wn.2d 910, 239 P.2d 858 (1952), a robbery victim identified *the car* used by the robber, and that car was subsequently stopped and the occupants arrested. In this case, the robbery victim identified no car, and the witness provided no link between the Kraus vehicle and the robbery, other than its location in a crowded adjacent parking lot.

State v. Donohoe, 39 Wn. App. 778, 695 P.2d 150 (1985), another case cited by Petitioners, was decided after this incident, and involved probable cause to search, not arrest. In that case, a Chevrolet Blazer with Idaho license plates was identified as having been in the vicinity of a 1:30 a.m. burglary, and was again spotted at 2:30 a.m. by a police officer, who had heard a broadcast concerning the burglary, and spotted property in the car similar to that which was stolen. At 4:25 a.m., the vehicle was again spotted,

the occupants detained, and a search warrant obtained to search the vehicle.

Similarly, each and every other case cited can be distinguished in that, in each case, there is a direct link between a vehicle and its occupants to a crime or its scene. According to Petitioners' reasoning in this case, anyone seen leaving the crowded shopping center parking lot at the time of the incident who appeared to be in a hurry was a potential suspect. It is unimaginable that, on the basis of the information that the deputies had at the time they surrounded the home, any neutral and detached magistrate would have found probable cause to issue a warrant for the arrest of Mr. Kraus. No reasonable police officer would have believed that there was probable cause for the arrest.

Petitioners' reasoning is also flawed in that they appear to argue that unless there is precedent which states that under identical facts there was no probable cause to arrest, the law is not clearly established. Acceptance of this theory would result in a rule that police officers are shielded from liability for any unlawful arrest unless there is a case in which the issue of probable cause was decided under identical facts. Such a rule would virtually eliminate civil rights actions alleging unlawful arrest.

E. The Order Denying Pierce County's Motion For Summary Judgment Is Not An Appealable Final Decision, And There Are Genuine Issues Of Material Fact As To Its Liability Which Require Discovery.

On September 6, 1985, an Order staying discovery was entered in this matter, which precluded the taking of the

depositions of the deputies and their superiors. App. "B", pp. 4-5. Without the benefit of such discovery, the Plaintiffs could not present evidence of policy or custom on the part of Pierce County which would subject it to liability. Pierce County, of course, could not, and did not, claim it was immune from suit. *See, Owen v. City of Independence,* 445 U.S. 622, 63 L.Ed.2d 673, 100 S.Ct. 1398 (1980). Certainly, it would have been inappropriate for the District Court to have considered Pierce County's Motion for Summary Judgment when the Plaintiffs had not had the opportunity to take discovery depositions of the deputies and their superiors.

Fed.R.Civ.P. 56 (f) allows for the continuance of a summary judgment motion to permit depositions to be taken. In this case, Petitioners were granted a stay of discovery pending a decision on their summary judgment motion. Such a procedure should not be sanctioned, as Plaintiffs should always have an opportunity to fully discover their case.

Finally, as noted by the Ninth Circuit, *Mitchell v. Forsyth, supra,* does not allow the automatic appeal of summary judgments involving governmental employers, as immunity is not a defense. *Kraus,* 793 F.2d at 1108.

CONCLUSION

It is respectfully submitted that there is no split of authority as to whether the deputies have qualified immunity from suit in this matter, and for that reason, and the other reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-1222

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TABLE OF CONTENTS

I. RESTATEMENT OF THE CASE..... 1

II. REPLY TO RESPONDENTS' ARGUMENT.... 3

A. Denial of Petitioners' Motion Is Appealable Under Mitchell and San Filippo..... 3

B. Certiorari Should Be Granted To Correct A Departure From This Court's Decisions Distinguishing "Investigatory Stops" From "Arrests."..... 4

C. Certiorari Should Be Granted To Decide Whether A Federal Right Is "Clearly Established" By Previous Precedents Analyzing Similar Facts..... 6

D. Certiorari Should Be Granted To Resolve The Split Whether State Decisions Should Be Considered In Analyzing When A Right Is "Clearly Established"..... 8

III. CONCLUSION..... 10

TABLE OF AUTHORITIES

Cases

Harlow v. Fitzgerald, 457 U.S. 800, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1983)... 7

Kraus v. Pierce County, 793 F.2d 1105 (9th Cir. 1986).... 2,4,8

Mitchell v. Forsyth, ___ U.S. ___, 86 L.Ed.2d 411, 105 S.Ct. 2806 (1985)..... 3

San Filippo v. U.S. Trust Co. of New York, 737 F.2d 246 (2nd Cir. 1984)..... 4

State v. Donohoe, 39 Wn.App. 778, 695, P.2d 150 (1985).... 9

State v. Gluck, 83 Wn.2d 424, 518 P.2d 703 (1974)..... 8

State v. Wakely, 29 Wn.App. 238, 628 P.2d 835 (1981)..... 7

State v. Young, 39 Wn.2d 910, 239 P.2d 858 (1952)..... 9

United States v. Cortez, 449 U.S. 411, 66 L.Ed.2d 621, 1101 S.Ct. 690 (1981)... 5

United States v. Mendenhall, 446 U.S. 544, 64 L.Ed.2d 497, 100 S.Ct. 1870 (1980)... 4,5

United States v. Taylor,
716 F.2d 701 (9th Cir. 1983). 7

Wallace v. King, 626 F.2d 1157
(4th Cir. 1980)..... 8

Other Authorities

Supreme Court Rule
17.1(a)..... 10

Supreme Court Rule
17.1(c)..... 6,7

I. RESTATEMENT OF THE CASE

Although respondents misstate several facts, most bothersome is the baseless allegation that they were ordered "out of their homes at gunpoint . . ." Resp. brief at 7. Not only is the record devoid of support for such a claim, but Dale Kraus testified he was unaware deputies were present until after he stepped out of his house (App. C at 21, 31-34). Further, respondents revealingly do not disclose that after Kraus was asked to come to the front door to talk, both he and Todd Montgomery instead suddenly appeared from two separate exits with Kraus moving swiftly toward the deputies with an object feared to be a weapon in his hand (App. C at 27, 31-32, 37, 45).

Although respondents seek to confuse

issues by asserting the telephone call was an "intrusion" and that their house was later "searched," Resp. brief at 3, 7, 9, the Court of Appeals properly ignored this first claim and expressly ordered judgment for petitioners on the second. See Kraus v. Pierce County, 793 F.2d 1105, 1110 (9th Cir. 1986). Rather, the issues on appeal are: 1) May a municipal employer appeal the denial of summary judgment where the issues are similar to their officers' appeal on immunity; 2) were the deputies' precautions within the scope of an investigatory stop; 3) may officers rely on previous precedent to determine when a right is "clearly established"; and 4) should state case law be considered in analyzing if similar facts have been "clearly established" as constituting probable cause?

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II. REPLY TO RESPONDENTS' ARGUMENT.

A. Denial of Petitioners' Motion Is Appealable Under Mitchell And San Filippo.

Respondents assert the denial of the deputies' motion for summary judgment is not appealable because there are disputed factual issues regarding probable cause. However respondents do not identify these "facts," and both the information possessed by the deputies and the events at the house are undisputed. Respondents actually are attacking Mitchell v. Forsyth, ___ U.S. ___, 86 L.Ed.2d 411, 419, 105 S.Ct. 2806 (1985) which held that "the appealable issue is a purely legal one, whether the facts alleged (by the plaintiff, or, in some cases, the defendant) support a claim of violation of clearly established law."

Although the Court of Appeals on the

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other hand did reject the County's right to appeal, Kraus, 793 P.2d at 1108, petitioners have demonstrated such was in conflict with San Filippo v. U.S. Trust Co. of New York, 737 F.2d 246 (2nd Cir. 1984). Pet. for Writ of Cert. at 28-30. Respondents fail to address either this precedent or the issue raised by it.

B. Certiorari Should Be Granted To Correct A Departure From This Court's Decisions Distinguishing "Investigatory Stops" From "Arrests."

Like the Ninth Circuit, respondents confuse an "arrest" with a "seizure" by their erroneous belief that an arrest exists when "a reasonable person would have believed that he was not free to leave." Resp. brief at 6; Kraus, 793 F.2d at 1109. Rather, some "seizures . . . involve only a brief detention short of traditional arrest" and require only reasonable suspicion. See United

States v. Mendenhall, 446 U.S. 544, 551, 64 L.Ed.2d 497, 100 S. Ct. 1870 (1980) (emphasis added). Although respondents quote the appropriate test for a seizure, Id. at 554, such is not the test for the "type" of seizure known as an arrest. Pet. for Writ of Cert. at 19-21.

Respondents assert that the deputies lacked even "reasonable suspicion," but the facts known to the deputies at least were a "particularized and objective basis for suspecting the particular person stopped of criminal activity." See United States v. Cortez, 449 U.S. 411, 417, 66 L.Ed.2d 621, 1101 S. Ct. 690 (1981); Pet. for Writ of Cert. at 23-24.

The true issue at this point is whether the scope of an otherwise valid investigatory stop was exceeded so as to become an "arrest" requiring probable cause. Because the Ninth Circuit applied

the wrong test and erroneously concluded that the deputies' conduct constituted an "arrest" rather than a "stop," Pet. for Writ of Cert. at 20-27, its decision conflicts with the applicable decisions of this Court and requires review. See Sup. Ct. R. 17.1(c).

C. Certiorari Should Be Granted To Decide Whether A Federal Right Is "Clearly Established" By Previous Precedents Analyzing Similar Facts.

Respondents allege their rights were "clearly established" because it was settled at the time of the incident that "an arrest without probable cause violates the constitutional rights of the person arrested." Resp. brief at 5. However, petitioners assert that where prior precedent exists upholding similar conduct, officers are immune when they conform their actions to it. Here, previous Washington and Ninth Circuit authority

had upheld far more intrusive precautions as within the scope of an investigatory stop. See U.S. v. Taylor, 716 F.2d 701 (9th Cir. 1983); State v. Wakeley, 29 Wn.App. 238, 628 P.2d 835 (1981); Pet. for Writ of Cert. at 25-27.

Respondents' however choose not to confront how these cases affect the scope of an investigatory stop, but instead attempt to distinguish them on the irrelevant ground that there the officers allegedly had stronger reasonable suspicion. Resp. brief at 8. Because this Court has yet to state how a federal right is "clearly established", Harlow v. Fitzgerald, 457 U.S. 800, 818 n.32, 73 L.Ed.2d 396, 102 S. Ct. 2727 (1983), the Ninth Circuit decided an important question of federal law which has not been, but should be, settled by this Court. See Sup. Ct. R. 17.1(c).

D. Certiorari Should Be Granted To Resolve The Split Whether State Decisions Should Be Considered In Analyzing When A Right Is "Clearly Established."

In analyzing whether it was "clearly established" that probable cause did not exist for the alleged "arrest," the Ninth Circuit disregarded petitioners' citation to state case law. Kraus, 793 F.2d at 1109-1110. Respondents deny the existence of a split among the federal circuits on this issue but fail to address Fourth Circuit cases holding that state authority should be considered. E.g. Wallace v. King, 626 F.2d 1157, 1161 (4th Cir. 1980).

Instead respondents attempt without success to distinguish the Washington cases cited by petitioners and ignored by the Ninth Circuit. In State v. Gluck, 83 Wn.2d 424, 518 P.2d 703 (1974) the Washington State Supreme Court found probable

cause to arrest occupants of a car where the only connection between it and the crime was that the car in early morning had pulled away from a tavern prior to the discovery of a burglary there. In State v. Young, 39 Wn.2d 910, 239 P.2d 858 (1952) probable cause existed where the only connection between the vehicle and a robbery was that minutes before the crime a similar truck had driven past the business. In State v. Donohoe, 39 Wn.App. 778, 695 P.2d 150 (1985), the Washington Appellate Court continued to adhere to these precedents and found probable cause to arrest the occupants of a vehicle though the only connection between it and the crime was that a similar automobile had been seen in the area of a recent vehicle prowl.

Because petitioners are immune if Washington precedent is considered and

because there is a split among the circuits as to whether a state's decisional law should be analyzed, certiorari should be granted. See Sup. Ct. R. 17.1(a).

III. CONCLUSION

For the reasons stated in the Petition and above, it is respectfully requested that a writ of certiorari issue.

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